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No.

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the work-product privilege in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation.

CORPORATE DISCLOSURE STATEMENT

Textron Inc. has no parent corporation, and no publicly held company owns 10% or more of Textron's stock.

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PETITION FOR A WRIT OF CERTIORARI

Textron Inc., together with its subsidiaries, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-46a) is reported at 577 F.3d 21. The opinion of the court of appeals panel (App., *infra*, 47a-88a) is reported at 553 F.3d 87. The district court's order denying respondent's petition to enforce administrative summons (App., *infra*, 89a-118a) is reported at 507 F. Supp. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. On October 20, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari until December 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

In relevant part, Federal Rule of Civil Procedure 26(b)(3)(A) provides:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

STATEMENT

In 2003, the Internal Revenue Service (IRS) commenced an audit of petitioner's tax returns for tax years 1998 to 2001. In connection with that audit, the IRS issued an administrative summons for petitioner's workpapers relating to its potential tax liabilities for tax year 2001. Citing, *inter alia*, the work-product privilege, petitioner withheld certain documents, including a spreadsheet prepared by petitioner's lawyers that listed items on its return whose treatment was uncertain (and, as to each item, estimated the likelihood of success in the event of a dispute). The government then filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. The district court denied the petition. App., *infra*, 89a-118a. A panel of the court of appeals initially affirmed. *Id.* at 47a-88a. After granting rehearing en banc, however, the court of appeals reversed. *Id.* at 1a-46a.

1. This case presents a substantial circuit conflict on an issue of immense practical importance: the scope of the work-product privilege. The Court first recognized that privilege in *Hickman* v. *Taylor*, 329 U.S. 495 (1947).[1] In the course of discovery, the plaintiff in *Hickman* had sought materials "secured by an adverse party's counsel in the course of preparation for possible litigation after a claim ha[d] arisen." *Id.* at 497. Although the then-recent Federal Rules of Civil Procedure took a "broad and liberal" approach to discovery, *id.* at 507, and by their terms seemingly permitted the plaintiff to obtain the materials in question, see *id.* at 505-506, the Court held that the "work product" privilege protected "written materials obtained or prepared by an adversary's counsel with an eye toward litigation." *Id.* at 511. The Court explained that the work-product privilege was justified by historical practice, see *id.* at 510 n.9, and that a contrary rule would lead to "[i]nefficiency, unfairness and sharp practices," with the result that "the legal profession would be demoraliz[ed]" and "the interests of the clients and the cause of justice * * * poorly served," *id.* at 511.

In 1970, the Federal Rules of Civil Procedure were amended to codify the work-product privilege. Rule 26(b)(3) provides that the work-product privilege covers "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party

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[1] *Hickman* has variously been described as giving rise to a "doctrine," "protection," or "privilege." In keeping with the terminology of the Court's more recent decisions, we refer here to the "work-product privilege." See, *e.g.*, *Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *United States* v. *Hubbell*, 530 U.S. 27, 31 (2000); *Swidler & Berlin* v. *United States*, 524 U.S. 399, 402-403 (1998).

or its representative." The privilege is qualified rather than absolute: where a party to litigation can show that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," the party can obtain production of otherwise protected materials. Fed. R. Civ. P. 26(b)(3)(A)(ii). Even upon such a showing, however, the party may not obtain production of so-called "opinion work product": that is, materials that would "disclos[e] * * * the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). This case concerns the issue of when a document has been prepared "in anticipation of litigation," and is therefore protected by the work-product privilege, under Rule 26(b)(3).

2. Textron Inc. is a multi-industry corporation whose subsidiaries and operating units include such well-known businesses as Cessna Aircraft and Bell Helicopter. Textron and its subsidiaries file consolidated tax returns; they are collectively the petitioner before this Court. Because Textron is one of the Nation's largest corporations, petitioner's tax returns are routinely audited; in fact, the IRS has audit staff permanently based onsite at Textron, and, during the relevant period, had approximately 20 employees assigned to audit petitioner's returns. In 2003, the IRS commenced a scheduled audit of petitioner's tax returns for tax years 1998 to 2001. As part of that audit, the IRS issued more than 500 formal requests for information; petitioner produced "many file cabinets" worth of material in response to those requests. App., *infra*, 4a, 90a-91a; C.A. App. 184, 194-195, 227.

In tax year 2001, one of Textron's subsidiaries had engaged in several "sale-in, lease-out" transactions in-

volving telecommunications and rail equipment. In 2002, the IRS adopted a policy under which, where a taxpayer claims benefits from two or more similar "listed transactions" (*i.e.*, transactions whose tax treatment was, in the IRS's view, open to question), the IRS would seek *all* of the taxpayer's "tax accrual workpapers" (*i.e.*, workpapers relating to potential tax liabilities) for the tax year in question, regardless whether those workpapers pertained to the transactions at issue. See I.R.S. Announcement 2002-63, 2002-2 C.B. 72. Although the "sale-in, lease-out" transactions were not classified as "listed transactions" at the time Textron's subsidiary engaged in them, they were so classified several years later, and petitioner duly informed the IRS of the transactions. See I.R.S. Notice 2005-13, 2005-1 C.B. 630; App., *infra*, 4a, 91a; C.A. App. 252-255.

Based on those transactions, and notwithstanding the fact that the subsidiary had received legal advice that its tax treatment of those transactions was appropriate, the IRS issued a request, followed by an administrative summons, for petitioner's 2001 workpapers. In response, petitioner expressed its willingness to produce documents relating to the transactions at issue. But it withheld other documents relating to its return as a whole, including, most notably, a spreadsheet prepared by its in-house lawyers that listed items on its return whose treatment was uncertain (and, as to each item, estimated the likelihood of success in the event of a dispute),[2] and background memorandums that set out the legal analysis behind those estimates. By its own admis-

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[2] A redacted version of a comparable spreadsheet from a prior tax year was introduced as an exhibit in the district court and is reproduced in the appendix to this petition at pages 121a to 122a.

sion, the IRS sought those documents in order to obtain a "roadmap" to petitioner's tax return, because those documents would "provid[e] guidance" in reviewing petitioner's tax return and "disclos[e] unidentified issues." App., *infra*, 5a, 31a, 91a-93a; Gov't C.A. Br. 7, 19; Gov't C.A. Reply Br. 16 n.7.

3. Pursuant to 26 U.S.C. 7604, the government then filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. As is relevant here, petitioner contended that the withheld documents were protected by the work-product privilege. In support of that contention, petitioner submitted affidavits regarding the method by which the documents were prepared, and also presented testimony at an evidentiary hearing concerning the documents' purposes. Specifically, the head of petitioner's tax department testified that, although one purpose of the documents was to assist petitioner's independent auditor in reviewing the amount set aside in reserve for potential tax liabilities in the event of disputes, another purpose was to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200 (testimony of Norman Richter).

After the evidentiary hearing, the district court denied the government's petition. App., *infra*, 89a-118a. As is relevant here, the district court held that the documents at issue were covered by the work-product privilege. *Id.* at 105a-110a. The district court noted that, although courts had "applied * * * different tests in determining whether a document was prepared 'in anticipation of litigation,'" *id.* at 107a, "the relevant inquiry is whether the document was prepared or obtained 'because of' the prospect of litigation." *Ibid.* Applying that standard, the court determined that the documents

"would not have been prepared at all 'but for' the fact that [petitioner] anticipated the possibility of litigation with the IRS." *Id.* at 108a. The court explained that, "[i]f [petitioner] had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." *Ibid.* The court added that, "even if the workpapers were needed to satisfy [petitioner's auditor] that [petitioner's] reserves complied with [generally accepted accounting principles], that would not alter the fact that the workpapers were prepared 'because of' anticipated litigation with the IRS." *Id.* at 109a.[3]

4. The government appealed. A divided panel of the court of appeals initially affirmed in relevant part, agreeing with the district court that the documents at issue were covered by the work-product privilege. App., *infra*, 47a-88a. After granting the government's petition for rehearing en banc, however, the court of appeals reversed by a 3-2 vote. *Id.* at 1a-46a.

a. The en banc court of appeals first noted that, under Federal Rule of Civil Procedure 26(b)(3), the work-product privilege extends to documents that are "prepared in anticipation of litigation or for trial." App., *infra*, 11a. At the same time, the court reasoned that "how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic." *Id.* at 9a. The court of appeals also observed that "the Supreme Court has not ruled on the issue before us,

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[3] The district court determined that the documents at issue were also covered by the attorney-client privilege, App., *infra*, 99a-102a, but that petitioner had waived that privilege by disclosing the documents to its auditor, *id.* at 110a-112a. Petitioner did not challenge the latter determination on appeal.

namely, one in which a document is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation." *Ibid.*

Although the court of appeals acknowledged that it had previously suggested that the relevant inquiry was whether the documents were prepared "because of" the prospect of litigation, App., *infra*, 9a, it ultimately held that the work-product privilege reached only documents that were "prepared *for use* in possible litigation." *Id.* at 11a. In adopting that standard, the court explained that "[i]t is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated," *id.* at 16a, "[n]or is it enough that the materials were prepared by lawyers or represent legal thinking," *id.* at 17a. The court added, without elaboration, that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible * * * law suit." *Ibid.*

Applying the "for use" standard, the court of appeals determined that the documents at issue were not covered by the work-product privilege, reasoning that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." App., *infra*, 15a. The court noted that one purpose of the documents was to assist petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities in the event of disputed, *id.* at 11a, and summarily discounted petitioner's evidence that another purpose was to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items, *id.* at 14a-15a. The court concluded that "[t]here is no evidence in this case that the work papers were prepared for * * * use [in litigation] or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose." *Id.* at

18a-19a. In so concluding, the court conceded that "[o]ther circuits have not passed on tax audit work papers and some might take a different view." *Id.* at 18a.

b. Judge Torruella, joined by Judge Lipez, dissented. App., *infra*, 21a-46a. He criticized the majority for "abandon[ing] our 'because of' test"; "ignor[ing] a tome of precedents from the circuit courts"; "brush[ing] aside the actual text of Rule 26(b)(3)"; and "contraven[ing] m[any] of the principles underlying the work-product doctrine." *Id.* at 21a-22a.

At the outset, Judge Torruella noted that, while the majority had "claim[ed] allegiance" to the court of appeals' earlier decision applying the "because of" standard, App., *infra*, 22a, the majority in fact adopted a narrower standard by concluding that documents must be prepared "for use" in litigation in order to be protected by the work-product privilege. *Id.* at 23a. He explained that "no court * * * has so ruled," *id.* at 24a, and that the "for use" standard could not be reconciled either with the "because of" standard applied by the majority of the circuits or even with the narrower standard of the Fifth Circuit, which turns on whether the "primary purpose" for which the document was prepared was to assist in future litigation. *Id.* at 24a-27a. And as to the majority's application of the "for use" standard, Judge Torruella noted that "[l]ower courts deserve more guidance than a simple reassurance that a bare majority of the en banc court knows work product when it sees it." *Id.* at 27a.

Judge Torruella then contended that the majority's "for use" standard was incorrect, primarily because it was inconsistent with the language of Rule 26(b)(3), which protects not only documents prepared "for trial" but also documents prepared "in anticipation of litigation." App., *infra*, 28a. He explained that "the term 'an-

ticipation of litigation' should not be read out of the rule by requiring a showing that documents be prepared for trial." *Ibid.* Judge Torruella also contended that this case "squarely implicated" the policy rationales for the work-product privilege articulated in *Hickman*, because the documents at issue "contain counsel's ultimate impression of the value of the case" and thus "contain exactly the sort of mental impressions about the case that *Hickman* sought to protect." *Id.* at 31a. He added that, "if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid [doing so], thus diminishing the quality of representation." *Id.* at 32a. And he noted that the majority's approach would have significant ramifications beyond the specific context of this case, because it would allow parties to access documents assessing litigation risks more generally. *Id.* at 33a-34a.

Judge Torruella next determined that, under the "because of" standard, the documents at issue in this case would be covered by the work-product privilege. App., *infra*, 34a-45a. He noted that the district court had found both that "anticipation of litigation was the 'but for' cause of the documents' creation," *id.* at 36a, and that the documents were created for a litigation-related purpose as well as a business purpose, *id.* at 35a-36a. Judge Torruella contended that "[t]he majority ma[de] no effort to reject these factual findings," *id.* at 36a, but instead ignored them as irrelevant "without any finding of clear error," *id.* at 38a. Because the documents "were not prepared irrespective of the prospect of litigation," he reasoned, they would be protected under the correct standard. *Id.* at 43a (internal quotation marks omitted).

Judge Torruella concluded that the majority's decision "throw[s] the law of work-product protection into disarray," App., *infra*, 45a, and "will be viewed as a dangerous aberration in the law of a well-established and important evidentiary doctrine," *ibid.* He added that the majority's decision "further[s] the split" in the circuits concerning the meaning of Rule 26(b)(3), *ibid.*, and that "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country," *ibid.*

5. The court of appeals subsequently granted a stay pending the filing of a petition for certiorari. App., *infra*, 119a-120a. In so doing, the court of appeals acknowledged that "the work product privilege finds its origin in a Supreme Court decision that has not often been revisited by the Court," *id.* at 120a, and that "there is some difference in the interpretations adopted in different circuits," *ibid.*

REASONS FOR GRANTING THE PETITION

When measured in terms of its practical significance for civil litigants, this is one of the more important cases to come before the Court in some time. In the decision below, the en banc First Circuit adopted an unprecedentedly narrow interpretation of the work-product privilege in Federal Rule of Civil Procedure 26(b)(3), holding that the privilege is limited to documents that are prepared "for use" in litigation. That holding deepens a preexisting and longstanding circuit conflict: nine other courts of appeals have adopted inconsistent (but uniformly broader) views of the privilege's scope. The First Circuit's analysis, moreover, was deeply flawed, because its "for use" standard cannot be reconciled either with the language of Rule 26(b)(3) or with the poli-

cies underlying the work-product privilege. As the enormous amount of attention that this case has garnered reflects, the scope of the privilege is a recurring issue of obvious practical significance, and this case is an optimal vehicle in which to consider the issue. In sum, because this case is a compelling candidate for further review in every respect, certiorari should be granted.

A. The Decision Below Deepens A Circuit Conflict Concerning The Scope Of The Work-Product Privilege

1. As the First Circuit seemingly recognized, see, *e.g.*, App., *infra*, 18a, 120a, its decision conflicts with the decisions of nine other courts of appeals concerning the scope of the work-product privilege. That conflict warrants this Court's review.

a. Eight courts of appeals have held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry is whether the document was prepared or obtained "because of" the prospect of litigation. See, *e.g.*, *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States* v. *Adlman*, 134 F.3d 1194, 1202-1203 (2d Cir. 1998); *Martin* v. *Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States* v. *Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. Co.* v. *National Presto Indus., Inc.*, 709 F.2d 1109, 1118-1119 (7th Cir. 1983); *Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004). That standard appears to have originated in the leading treatise on civil procedure, which states that, for purposes of the "in anticipation of litigation" requirement, "the test should be whether, in light of the nature of the document and the

factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 343 (2d ed. 1994) (Wright & Miller).

In applying the "because of" standard, courts of appeals have focused on whether the document at issue would not have been prepared but for the prospect of litigation—or whether the document was prepared for a litigation-related purpose, even if it was prepared for another purpose as well. For example, in *Adlman*—perhaps the most influential lower-court decision on the scope of the work-product privilege—the Second Circuit held that the privilege covered a document that, *inter alia*, made "predictions about the likely outcome of litigation" with the IRS that could result from a company's planned merger. 134 F.3d at 1195. The court concluded that, "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)." *Ibid.* In so concluding, the court determined that "[t]he fact that [the] document's purpose [was] business-related"—*viz.*, to assist the company in deciding whether to proceed with the merger in the first place—"appears irrelevant to the question whether it should be protected under Rule 26(b)(3)." *Id.* at 1200.

Similarly, in *Grand Jury Subpoena*, the Ninth Circuit held that the work-product privilege extended to documents that were created not only to assess a company's potential liability, but also to comply with certain regulatory requirements. 357 F.3d at 909-910. In adopting the "because of" standard, the court explained that the standard "does not consider whether litigation was a

primary or secondary motive behind the creation of a document," but rather "affords protection" when the document "would not have been created in substantially similar form but for the prospect of that litigation." *Id.* at 908 (quoting *Adlman*, 134 F.3d at 1195).

And in *Sealed Case*, the District of Columbia Circuit held that certain documents could be privileged despite the fact that no "specific claim" had arisen at the time the documents were prepared. 146 F.3d at 882. In the course of doing so, the court reaffirmed its adoption of the "because of" standard, reiterating that "the 'testing question' for the work-product privilege" is whether a document "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* at 884 (internal quotation marks omitted) (quoting *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Committee* v. *United States Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987) (R.B. Ginsburg, J.)). The court noted that lawyers often prepared documents "prior to the emergence of specific claims," such as when lawyers "consider whether business decisions might result in antitrust or securities lawsuits" or "assess the possibility that new products might give rise to tort actions." *Id.* at 886. The court reasoned that, if the work-product privilege were not available in those situations, lawyers "would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively." *Ibid.*

b. Even before the First Circuit's decision in this case, there was a longstanding circuit conflict between the foregoing circuits and the Fifth Circuit, which has repeatedly held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry is whether the "primary motivating purpose" for which the docu-

ment was prepared was to assist in litigation. *United States* v. *Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981). Perhaps most significantly, in *United States* v. *El Paso Co.*, 682 F.2d 530 (1982), cert. denied, 466 U.S. 944 (1984), the Fifth Circuit held that the work-product privilege did not cover workpapers like those at issue in this case, on the ground that, even though the workpapers "forecast[] the ultimate likelihood of sustaining [the company's] position in court," the "primary motivating force" behind their preparation was "not to ready [the company] for litigation over its tax returns," but rather "to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability." 682 F.2d at 543.

Notably, in adopting the "because of" standard, numerous courts have expressly rejected the Fifth Circuit's more stringent "primary purpose" standard. See, *e.g.*, *Adlman*, 134 F.3d at 1198-1199 (noting, after citing *Davis* and *El Paso*, that "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of [Rule 26(b)(3)]"). Commentators have criticized the Fifth Circuit's standard as well. See, *e.g.*, Claudine Pease-Wingenter, *Prophetic or Misguided? The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 Rev. Litig. 121, 161 (2009) (contending that "[t]he Fifth Circuit's 'primary purpose' test is clearly at odds with the plain meaning of the text of Rule 26(b)(3) and undercuts the policy goals of the work product doctrine"). In the face of mounting criticism, however, the Fifth Circuit has adhered to its standard. See, *e.g.*, *In re Kaiser Aluminum & Chem. Co.*,

214 F.3d 586, 593 (2000), cert. denied, 532 U.S. 919 (2001).[4]

c. Although a panel of the First Circuit had previously suggested that it would follow the prevailing "because of" standard, see *Maine* v. *United States Dep't of Interior*, 298 F.3d 60, 68 (2002), the en banc First Circuit took a different approach in this case and held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry was whether the documents were "prepared *for use* in possible litigation." App., *infra*, 11a. While the First Circuit at one point purported to reaffirm its earlier decision in *Maine*, *id.* at 9a, it did not otherwise refer to the "because of" standard (on which the district court and the court of appeals panel had relied, see, *e.g.*, *id.* at 55a-57a, 107a-108a), but instead repeatedly reiterated the novel requirement that a document must possess a litigation-related *use* in order to be protected. See, *e.g.*, *id.* at 14a ("could be useful" in litigation); *id.* at 15a ("prepared for use in litigation"); *id.* at 18a ("prepared for potential use in litigation"). And in applying that standard to the facts of this case, the court concluded that "[t]here is no evidence in this case that

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[4] The remaining three circuits—the Tenth, Eleventh, and Federal Circuits—have not addressed the issue. A district court recently predicted that the Eleventh Circuit would "align itself with the majority of the other courts of appeal[s] and adopt the 'because of litigation' test." *Regions Fin. Corp.* v. *United States*, No. 06-895, 2008 WL 2139008, at *5 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13866 (11th Cir. Dec. 30, 2008). By contrast, several district courts in the Tenth Circuit have adopted the Fifth Circuit's "primary purpose" standard. See, *e.g.*, *United States Fire Ins. Co.* v. *Bunge North America, Inc.*, 247 F.R.D. 656, 658-659 (D. Kan. 2007); *McEwen* v. *Digitran Sys., Inc.*, 155 F.R.D. 678, 682 (D. Utah 1994); *Gottlieb* v. *Wiles*, 143 F.R.D. 241, 253 (D. Colo. 1992).

the work papers were prepared for * * * use [in litigation] or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose." *Id.* at 18a-19a. As the dissent below explained, the First Circuit thus adopted a standard that is narrower than either the "because of" standard applied by eight other circuits or the "primary purpose" standard applied by the Fifth Circuit, neither of which requires a litigation-related use. See *id.* at 23a-27a (opinion of Torruella, J.). The First Circuit thereby deepened a circuit conflict that merits this Court's review.[5]

2. This case constitutes an ideal vehicle for the Court to resolve the well-entrenched circuit conflict concerning the scope of the work-product privilege, because the choice of the appropriate standard would plainly be dispositive of whether the privilege covers the documents at issue here.

a. As the district court and the court of appeals panel correctly determined, the documents at issue would be covered under the "because of" standard. See App., *infra*, 55a-74a (court of appeals panel); *id.* at 105a-110a (district court). To begin with, as the district court

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[5] In addition, numerous States have rules codifying the work-product privilege in materially identical terms to Federal Rule 26(b)(3), and many state courts of last resort (including courts within the First Circuit) have applied the "because of" standard in determining whether a document was prepared "in anticipation of litigation" under the applicable state rule. See, *e.g.*, *Commissioner of Revenue* v. *Comcast Corp.*, 901 N.E.2d 1185, 1203-1204 (Mass. 2009); *Springfield Terminal Ry. Co.* v. *Department of Transp.*, 754 A.2d 353, 357-358 (Me. 2000); *Henderson* v. *Newport County Regional YMCA*, 966 A.2d 1242, 1247 (R.I. 2009). In many cases, therefore, the practical effect of the decision below will be to render the availability of the work-product privilege in the First Circuit dependent on whether the case is being litigated in federal or state court.

found, "it is clear" that the documents "would not have been prepared at all 'but for'" the prospect of litigation with the IRS concerning the specified items from petitioner's tax return. *Id.* at 108a; see, *e.g.*, *Adlman*, 134 F.3d at 1195. That is true for the simple reason that, "[i]f [petitioner] had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." App., *infra*, 108a. Petitioner, moreover, presented ample evidence that there was a reasonable prospect of litigation with the IRS: all but one of its eight previous audits had resulted in at least some form of adversarial proceedings, with three resulting in litigation in federal court (including one proceeding that was still ongoing at the time the documents at issue were being prepared). See *id.* at 109a; *Textron Inc.* v. *Commissioner*, 336 F.3d 26, 28-30 (1st Cir. 2003).

In addition, to the extent that courts applying the "because of" standard have focused more specifically on whether the documents at issue were prepared for a litigation-related purpose (even if they were prepared for another purpose as well), see, *e.g.*, *Roxworthy*, 457 F.3d at 598-599; *Grand Jury Subpoena*, 357 F.3d at 907-908, it is clear that the "because of" standard would still be satisfied, because petitioner presented uncontroverted testimony to the district court that the documents were prepared not simply to assist petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities, but also to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200. Although the en banc majority appeared to discount that testimony in applying its "for use" standard, see App., *infra*, 14a, the district court seemingly credited it in reaching a contrary result under the "because of" standard, see, *e.g.*, *id.*

at 93a-94a, and the government did not challenge the credibility of that testimony on appeal, see Gov't C.A. Br. 52 n.16. In sum, because the documents at issue would not have been prepared but for the prospect of litigation and were in fact prepared for a litigation-related purpose, they would be covered under the "because of" standard.

b. Lower-court decisions applying the "because of" standard confirm that conclusion. At least one district court has extended work-product protection to similar documents under the "because of" standard, reasoning that, "[w]ere it not for anticipated litigation, [the company] would not have to worry about contingent liabilities and would have no need to elicit opinions regarding the likely results of litigation." *Regions Fin. Corp.* v. *United States*, No. 06-895, 2008 WL 2139008, at *5-*6 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13866 (11th Cir. Dec. 30, 2008). And although no court of appeals applying the "because of" standard has specifically considered documents provided to a company's auditor for the purpose of reviewing the amount set aside in reserve for potential tax liabilities, courts of appeals applying that standard have suggested that the privilege would reach documents that assess potential tax liabilities, see, *e.g.*, *Roxworthy*, 457 F.3d at 592; *Adlman*, 134 F.3d at 1195,[6] and documents provided to a company's auditor for the purpose of reviewing the amount set aside for potential litigation liabilities more generally, see, *e.g.*, *Adlman*, 134 F.3d at 1200. Because the documents at issue here do not meaningfully differ from the documents discussed

[6] The government contended below that the Sixth Circuit's decision in *Roxworthy* was "incorrect[]." Gov't C.A. Reply Br. 48 n.19.

in those cases, they would surely be covered under the "because of" standard applied by the majority of circuits.

By contrast, the only lower courts to hold that documents of the type at issue here would not be subject to the work-product privilege are the en banc First Circuit, applying its newly minted "for use" standard, and the Fifth Circuit, applying its distinct "primary purpose" standard. See *El Paso*, 682 F.2d at 542-544. The choice of the appropriate standard would therefore be dispositive of whether the documents at issue are covered by the privilege—and, for that reason, this case constitutes a suitable vehicle for resolution of the circuit conflict on the privilege's scope.

B. The Court Of Appeals' Decision Is Erroneous

The en banc First Circuit erred in holding that the work-product privilege in Federal Rule of Civil Procedure 26(b)(3) is limited to documents that are prepared for use in litigation.

1. Most importantly, the First Circuit's novel "for use" standard cannot be reconciled with the plain language of Rule 26(b)(3). By its terms, that provision reaches not only documents prepared "for trial," but also documents prepared "in anticipation of litigation": *i.e.*, documents prepared "in *contemplation* of litigation." *Senate of the Commonwealth of Puerto Rico*, 823 F.2d at 586 (emphasis added) (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)). The First Circuit's standard, however, seemingly writes the "broader category" of documents prepared "in anticipation of litigation" out of the rule altogether, because a document that is prepared for use in litigation would presumably always qualify as a document prepared "for trial." *Adlman*, 134 F.3d at 1198; see *ibid.* (noting that, "[i]f the drafters of the Rule intended to limit its protection to documents

made to assist in preparation for litigation, this would have been adequately conveyed by the phrase 'prepared * * * for trial'") (second alteration in original). The First Circuit's interpretation would therefore apparently contravene the familiar canon of construction that a court should "give effect, if possible, to every word [the provision] used." *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (citation omitted). And even if some independent meaning could be attributed to the phrase "in anticipation of litigation," the First Circuit's "for use" standard would at best engraft a substantial limitation on the scope of the work-product privilege that is nowhere to be found in the language of Rule 26(b)(3)—as the en banc majority implicitly acknowledged. See App., *infra*, 16a; *Adlman*, 134 F.3d at 1198 (noting that "[n]owhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product").[7]

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[7] In adopting the "for use" standard, the First Circuit cited two of this Court's decisions, neither of which is apposite. The First Circuit first quoted *FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983), for the proposition that "the literal language of [Rule 26(b)(3)] protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." App., *infra*, 16a (emphasis in First Circuit's opinion) (quoting *Grolier*, 462 U.S. at 25). In *Grolier*, however, the Court was addressing only the discrete question whether the work-product privilege "extended beyond the litigation for which the documents at issue were prepared," 462 U.S. at 24—as the original emphasis in *the Court's* opinion makes clear. See *id.* at 25 (stating that "the literal language of [Rule 26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation"). The First Circuit also cited *Sears*. App., *infra*, 17a. That opinion, however, stands only for the proposition that documents prepared "in contemplation of" litigation "fall squarely" with the definition of protected work product—a proposition that is more

2. The First Circuit's standard is irreconcilable not only with the language of Rule 26(b)(3), but also with the policies animating the work-product privilege. In first recognizing the privilege in *Hickman*, this Court explained that the privilege was necessary because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 510. And the Court expressed a particular solicitude for an attorney's "thoughts," "mental impressions," and "personal beliefs," which, the Court noted, had previously been viewed as "inviolate." *Id.* at 511, 512. Notwithstanding the government's contention that the work-product privilege "hamper[s] the search for the truth," Gov't C.A. Reply Br. 4, this Court has repeatedly reaffirmed the "strong public polic[ies]" underlying the privilege, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 236 (1975) (internal quotation marks omitted), and those policies were "substantially incorporated" in Rule 26(b)(3), *Upjohn Co.* v. *United States*, 449 U.S. 383, 398 (1981).

The First Circuit's standard would strip protection from documents embodying an attorney's opinion as to the "likelihood of success in litigation," *Adlman*, 134 F.3d at 1200—documents that most directly implicate the policies underlying the work-product privilege (and therefore lie at the "core" of the privilege). See *Nobles*, 422 U.S. at 238; cf. *Hickman*, 329 U.S. at 516 (Jackson, J., concurring) (explaining that "[d]iscovery was hardly intended to enable a learned profession to perform its functions * * * on wits borrowed from the adver-

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consistent with other circuits' "because of" standard than with the First Circuit's "for use" standard. See p. 20, *supra*.

sary").[8] If such documents are not covered by the privilege, it would have a chilling effect on lawyers, who would be loath to commit their opinions to paper if the resulting documents were "open[] to the free scrutiny" of the IRS and other litigants. *Hickman*, 329 U.S. at 514. An approach that permitted discovery of such documents would therefore lead to the "inefficiency" of which *Hickman* warned, with the result that "the legal profession would be demoraliz[ed]" and "the interests of the clients and the cause of justice * * * poorly served." *Id.* at 511.

3. In support of its "for use" standard, the First Circuit cited an advisory committee note to Rule 26(b)(3), which indicates that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes" are not protected by the privilege. Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970). That note, however, speaks only to situations in which a document has *only* a non-litigation-related purpose—not, as here, a non-litigation-related purpose *and* a litigation-related purpose as well. See, *e.g.*, 8 Wright & Miller § 2024, at 346 (citing the advisory committee note for the proposition that, "even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business *rather than* for purposes of litigation") (emphasis added); *id.* at 198 (Supp. 2009) (adding that "'[d]ual purpose' docu-

[8] Indeed, the government has not disputed in this case that, if the documents at issue are subject to the privilege in the first place, they would qualify as "opinion work product" and would therefore be protected from disclosure even upon a showing of substantial necessity. See Fed. R. Civ. P. 26(b)(3)(B).

ments created because of the prospect of litigation are protected even though they were also prepared for a business purpose"). As the dissent below noted, a contrary understanding of the advisory committee note would create an atextual exception to Rule 26(b)(3), by excluding documents that would otherwise fall within the scope of the rule whenever the documents possessed an additional purpose beyond a litigation-related purpose. See App., *infra*, 42a-43a (opinion of Torruella, J.).[9]

In sum, there is no valid justification for the First Circuit's novel limitation on the scope of the work-product privilege. This Court should grant review in order to eliminate the circuit conflict and correct the First Circuit's seriously flawed approach.

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[9] Before the First Circuit, the government argued that the documents at issue should not be covered by the work-product privilege because petitioner was legally required to generate them. See Gov't C.A. Supp. Br. 2-4. The First Circuit did not rely on that argument, and for good reason. That is because, at most, the law "requires that [petitioner] prepare audited financial statements reporting total reserves based on contingent tax liabilities" and does not "require the form and detail of the documents prepared here." App., *infra*, 32a (Torruella, J., dissenting). To be sure, petitioner prepared the documents for the purpose, *inter alia*, of assisting petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities (and thus in performing its obligation to review petitioner's financial statements for compliance with generally accepted accounting principles). The salient point, however, is that, but for the prospect of litigation with the IRS, petitioner would not have needed to prepare the documents at all. See, *e.g.*, C.A. App. 200 (testimony of Norman Richter) (explaining that, if petitioner had not anticipated litigation with the IRS, the documents "would be blank" and "[w]e would have nothing there").

C. The Question Presented Is An Exceptionally Important And Recurring One That Merits The Court's Review In This Case

Finally, the question presented in this case is an exceptionally important one because it concerns the scope of the work-product privilege—an issue that is "essential to the daily practice of litigators across the country." App., *infra*, 45a (Torruella, J., dissenting). If the First Circuit's unprecedented interpretation of the work-product privilege is allowed to stand, it will have profound consequences for civil litigants in a variety of different contexts.

1. As a preliminary matter, the factual context in which this case arises—*i.e.*, whether the work-product privilege extends to documents assessing risks in tax litigation for the purpose, *inter alia*, of assisting a company's auditor in reviewing the amount set aside in reserve—is important in its own right. Because of the size and complexity of their operations, publicly held companies inevitably find themselves taking positions on their tax returns that fall into "gray areas" as to which there is legal uncertainty (because the relevant statutory or regulatory language is unclear and the IRS has provided no guidance on point). For that reason, virtually all publicly held companies generate so-called "tax accrual workpapers" in some form. If a company is required to disclose such documents to the IRS, it will give the IRS a "blueprint" to the company's thinking in preparing its tax return (as the en banc majority acknowledged, see App., *infra*, 20a); indeed, the IRS has freely admitted that it sought the documents at issue here for that reason. See pp. 5-6, *supra*. But that kind of disclosure would contravene the fundamental principle, established in *Hickman*, that a party is not entitled to an opposing attorney's "assessment of * * * legal vulnerabilities in order to

make sure it does not miss anything in crafting its legal case." *Delaney, Migdail & Young, Chartered* v. *IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987).[10]

Not surprisingly, the decision below has already emboldened the IRS—which, before 2002, had only rarely sought workpapers from taxpayers, see C.A. App. 238; *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 820-821 (1984)—to declare that it will aggressively pursue such workpapers in future. See Kim Dixon, *U.S. IRS Could Seek More in Company Audits—Official*, Reuters, Nov. 19, 2009 (quoting comments by William Wilkins, IRS Chief Counsel). And because disclosure to an adverse party waives the work-product privilege, see 8 Wright & Miller § 2024, at 369, a company that is required to disclose its workpapers to the IRS will likely be obligated to turn over those workpapers to *state* taxation authorities (even if a state court would construe the privilege more broadly, see p. 17, n.5, *supra*) and even to private litigants, thereby compounding the consequences of the First Circuit's approach.

2. The practical significance of the First Circuit's approach, however, sweeps far beyond the particular context of this case. The First Circuit's "for use" standard is in no way cabined to that context—nor could it logically be, as the government seemingly recognized at oral argument below. See C.A. En Banc Tr. 4-5, 16

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[10] Ironically, in *Delaney*, the IRS argued that the work-product privilege covered documents *it* had prepared to analyze the legal vulnerability of a particular auditing method, and the District of Columbia Circuit agreed. See 826 F.2d at 126-128; cf. C.A. Panel Tr. 20 (Sept. 5, 2008) (stating that the government "spend[s] a lot more time defending our documents from requests on the grounds of work product than we do * * * seek[ing] them [from other parties]").

(June 2, 2009) (conceding that the "work product test" adopted by the court "will apply" both "to the IRS" and "to everyone else," including "outside the tax realm").

Under the First Circuit's standard, work-product protection would no longer extend to *any* documents prepared by counsel that assess the risks of ongoing or potential litigation, because such documents could not meaningfully be said to have been prepared "for use" in litigation. For example, the work-product privilege would not cover a document that a company prepares in order to inform a potential merger partner of the litigation risks that the company faces—risks that the partner would assume in the event the merger is consummated. See, *e.g.*, *Adlman*, 134 F.3d at 1195. Nor would it cover so-called "audit response letters": that is, letters routinely prepared by outside counsel at their corporate clients' request assessing pending or threatened litigation against the company for the purpose of assisting the company's auditor in performing its duties. See, *e.g.*, *Lawrence E. Jaffe Pension Plan* v. *Household Int'l, Inc.*, 237 F.R.D. 176, 179-181 (N.D. Ill. 2006) (holding that work-product privilege covers audit response letters); *In re Honeywell Int'l, Inc., Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) (same); *Tronitech, Inc.* v. *NCR Corp.*, 108 F.R.D. 655, 656 (S.D. Ind. 1985) (same).[11] In those and other similar contexts, the documents at issue contain information that would be enormously valuable to adverse parties in litigation, and the work-product privilege would provide the only potential source of protec-

[11] The government conceded below that, if the documents at issue in this case were not protected by the work-product privilege, audit response letters would not be protected either. See C.A. En Banc Tr. 19 (June 2, 2009).

tion against disclosure (because the attorney-client privilege is waived by disclosure to *any* third party, even a potential merger partner or auditor). See 8 Wright & Miller § 2024, at 367-368.[12]

Perhaps for that reason, the First Circuit's decision has received an enormous amount of attention from the news media and commentators—and, belying the First Circuit's belief that "[n]o one with experience of law suits" would reach a contrary conclusion, App., *infra*, 17a, the decision has also been greeted with widespread consternation by practitioners. See, *e.g.*, Nancy T. Bowen, William S. Lee & Robert C. Morris, *Newly Minted 'For Use in Possible Litigation' Test of 'Textron' May Have Far-Reaching Implications for Companies*, 78 U.S.L.W. 2199, 2199 (2009) (stating that the decision below is "highly controversial"; "may have far-reaching implications, particularly for publicly traded companies"; and "adds further uncertainty to [an] already confused legal arena"); Amir Efrati, *Ruling in Tax-Auditing Case Puts Corporations on Edge*, Wall St. J., Aug. 20, 2009, at A9 (suggesting that the decision below "is causing lawyers for big companies some sleepless nights" and has been seen as "signal[ing] an attack by the courts on the 'work-product doctrine'"); Michelle M. Henkel, *'Textron' Eviscerates the 60-Year-Old Work Product Privilege*, 125 Tax Notes 237, 237 (2009) (contending that, "[b]ecause of the widespread impact of [the decision below],

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[12] In fact, relying on the decision below, the Director of the SEC's Division of Enforcement recently made the unqualified assertion that "audit documentation * * * relied on by an auditor in connection with an audit report" is not covered by the work-product privilege. See Robert Khuzami, Remarks at AICPA National Conference on Current SEC and PCAOB Developments (Dec. 8, 2009) <www.sec.gov/news/speech/2009/spch120809rsk.htm>.

the entire legal profession and all corporations should be in a state of disbelief").

In addition, in the wake of the First Circuit's decision, practitioners have already begun recommending that companies take steps to avoid the disclosure to adverse parties of their litigation risk assessments. See, *e.g.*, Scott Novick, *What In-House Tax Professionals Should Do in Light of 'Textron,'* Global Tax Blog (Aug. 31, 2009) <tinyurl.com/scottnovick> (contending that "tax departments can and should * * * [l]imit[] tax accrual work papers to numerical analysis with minimal supporting narrative"); Robert W. Pommer III, *First Circuit Reverses Course in Closely Watched Work Product Case; Establishes Broad New Standard That Could Extend Outside Tax Area*, 41 Sec. Reg. & Law Report 2050, 2053 (2009) (recommending that companies "exercise greater caution when sharing documents with the[ir] outside auditors"); cf. Stuart J. Bassin, *Managing Tax Accrual Workpapers After 'Textron,'* 123 Tax Notes 571, 580 (2009) (suggesting, while this case was still pending below, that the drafters of workpapers "should choose their words carefully"). Those recommendations amply support the prediction that the First Circuit's decision will have a broad chilling effect if it is allowed to stand.

3. Although issues concerning the applicability of the work-product privilege arise in courts around the Nation on a daily basis, this Court has not directly addressed the scope of the privilege since its decision more than sixty years ago in *Hickman*. See App., *infra*, 120a.[13] But notwithstanding the frequent recurrence in

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[13] In *Arthur Young*, the Court refused to recognize an "accountant work-product privilege" for workpapers generated by a compa-

lower courts of issues concerning the privilege, if the Court does not grant review in this case, it is far from clear when the Court will have the opportunity to do so again. In ordinary civil litigation, a party that wishes to appeal a determination that a document is not covered by the work-product privilege may not be able to do so immediately, cf. *Mohawk Indus., Inc.* v. *Carpenter*, No. 08-678 (Dec. 8, 2009), slip op. 9-10 (explaining options for appeal of denial of attorney-client privilege), and, even if it can, the party will have to bear the expense of litigating what is an inherently collateral issue all the way to this Court.

At all events, there is simply no reason for the Court to wait to address the scope of the work-product privilege. Ten circuits have now spoken on the issue, taking three different (and irreconcilable) positions on the privilege's scope. This case, moreover, is an optimal vehicle for consideration of that issue. As the dissent below observed, "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight." App., *infra*, 45a (opinion of Torruella, J.). The Court should grant review in this extraordinarily important case and correct the First Circuit's excessively narrow interpretation of the work-product privilege.

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ny's *auditor*. See 465 U.S. at 815-821. In some respects, this case presents the flipside of the issue in *Arthur Young*, because it involves workpapers generated by the company's *own lawyers*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2631

UNITED STATES OF AMERICA, Petitioner,
Appellant,

v.

TEXTRON INC. AND SUBSIDIARIES, Respondent,
Appellee.

August 13, 2009

Before: LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ and HOWARD, Circuit Judges.

BOUDIN, Circuit Judge.

The question for the *en banc* court is whether the attorney work product doctrine shields from an IRS summons "tax accrual work papers" prepared by lawyers and others in Textron's Tax Department to support Textron's calculation of tax reserves for its audited corporate financial statements. Textron is a major aerospace and defense conglomerate, with well over a hundred subsidiaries, whose consolidated tax return is audited by the IRS on a regular basis. To understand the dispute, some

background is required concerning financial statements, contingent tax reserves and tax audit work papers.

As a publicly traded corporation, Textron is required by federal securities law to have public financial statements certified by an independent auditor. *See* 15 U.S.C. §§ 781, 78m (2006); 17 C.F.R. § 210 *et seq.* (2009). To prepare such financial statements, Textron must calculate reserves to be entered on the company books to account for contingent tax liabilities. Such liabilities, which affect the portrayal of assets and earnings, include estimates of potential liability if the IRS decides to challenge debatable positions taken by the taxpayer in its return.

The calculation of such reserves entails preparing work papers describing Textron's potential liabilities for further taxes; these underpin the tax reserve entries in its financial statement and explain the figures chosen to the independent auditor who certifies that statement as correct. By examining the work papers the accountant discharges its own duty to determine "the adequacy and reasonableness of the corporation's reserve account for contingent tax liabilities." *United States v. Arthur Young & Co.*, 465 U.S. 805, 812 (1984) (rejecting claim of accountant work product privilege protecting such work papers).[1] The work papers are thus one step in a process whose outcome is a certified financial statement for the company.

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[1] The procedural requirement that auditors examine tax accrual work papers is based on a combination of Statement on Auditing Standards No. 96, Audit Documentation (2002), *superseded by* Auditing Standards No. 3, Audit Documentation (2004); Statement on Auditing Standards No. 326, Evidential Matter (1980); and Auditing Interpretation No. 9326, Evidential Matter: Auditing Interpretations of Section 326 (2003).

In Textron's case, its Tax Department lists items in the tax return that, if identified and challenged by the IRS, could result in additional taxes being assessed. The final spreadsheets list each debatable item, including in each instance the dollar amount subject to possible dispute and a percentage estimate of the IRS' chances of success. Multiplying the amount by the percentage fixes the reserve entered on the books for that item. The spreadsheets reflecting these calculations may be supported by backup emails or notes.

A company's published financial statements do not normally identify the specific tax items on the return that may be debatable but incorporate or reflect only the total reserve figure. As the Supreme Court explained in *Arthur Young*, tax accrual work papers provide a resource for the IRS, if the IRS can get access to them, by "pinpoint[ing] the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes" and providing "an item-by-item analysis of the corporation's potential exposure to additional liability." 465 U.S. at 813.

The IRS does not automatically request tax accrual work papers from taxpayers; rather, in the wake of Enron and other corporate scandals, the IRS began to seek companies' tax accrual work papers only where it concluded that the taxpayer had engaged in certain listed transactions "that [are] the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction."

26 C.F.R. § 1.6011-4(b)(2) (2009). Only a limited number of transactions are so designated.[2]

The present case began with a 2003 IRS audit of Textron's corporate income tax liability for the years 1998-2001. In reviewing Textron's 2001 return, the IRS determined that a Textron subsidiary—Textron Financial Corp. ("Textron Financial")—had engaged in nine listed transactions. In each of the nine instances, Textron Financial had purchased equipment from a foreign utility or transit operator and leased it back to the seller on the same day. Although such transactions can be legitimate, the IRS determined that they were sale-in, lease-out ("SILO") transactions, which are listed as a potential tax shelter subject to abuse by taxpayers.

SILOs allow tax-exempt or tax-indifferent organizations—for example, a tax-exempt charity or a city-owned transit authority—to transfer depreciation and interest deductions, from which they cannot benefit, to other taxpayers who use them to shelter income from tax. Where the only motive of a sale and lease back is tax avoidance, it can be disregarded by the IRS and taxes assessed on the wrongly sheltered income.[3]

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[2] A current list of such transaction types, amounting to less than three dozen, appears at Internal Revenue Service, Recognized Abusive and Listed Transactions-LMSB Tier I Issues, http://www.irs.gov/businesses/corporations/article/0,id=120633,00.html (visited July 7, 2009).

[3] *See AWG Leasing Trust v. United States*, 592 F. Supp. 2d 953, 958 (N.D. Ohio 2008) (upholding denial of depreciation and interest deductions for SILO transaction); I.R.S. Notice 2005-13, 2005-9 I.R.B. 630 (Feb. 11, 2005); Shvedov, *Tax Implications of SILOs, QTEs, and Other Leasing Transactions with Tax-Exempt Entities* 10-12, CRS Report for Congress (Nov. 30, 2004).

Textron had shown the spreadsheets to its outside accountant, Ernst & Young, but refused to show them to the IRS. The IRS issued an administrative summons pursuant to 26 U.S.C. § 7602 (2006), which allows the IRS, in determining the accuracy of any return, to "examine any books, papers, records, or other data which may be relevant or material to such inquiry." *Id.* § 7602(a)(1). According to IRS policy, where the taxpayer claims benefits from only a single listed transaction, the IRS seeks only the workpapers for that transaction; but where (as in Textron's case) the taxpayer claims benefits from multiple listed transactions, the IRS seeks all of the workpapers for the tax year in question. I.R.S. Announcement 2002-63, 2002-27 I.R.B. 72 (July 8, 2002). The summons also sought related work papers created by Ernst & Young in determining the adequacy of Textron's reserves that Textron might possess or could obtain. Textron again refused.

The IRS brought an enforcement action in federal district court in Rhode Island. *See* 26 U.S.C. § 7604(a) (2006). Textron challenged the summons as lacking legitimate purpose and also asserted, as bars to the demand, the attorney-client and tax practitioner privileges and the qualified privilege available for litigation materials under the work product doctrine. The IRS contested all of the privilege claims. Both the IRS and Textron filed affidavits and, in addition, the district court heard witnesses from both sides.[4]

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[4] Textron's evidence came from Norman Richter, chief tax counsel and manager of Textron's Tax Department; Roxanne Cassidy, director of tax reporting; Edward Andrews, director of tax audits; Debra Raymond, vice president, taxes, of Textron Financial; and Mark Weston, a partner in Ernst & Young. IRS evidence was provided by Internal Revenue Agent Edward Vasconcellos; Professor

Textron agreed that it usually settled disputes with the IRS through negotiation or concession or at worst through the formal IRS administrative process; but it testified that sometimes it had litigated disputed tax issues in federal court. Its evidence also showed that the estimates for tax reserves and the supporting work papers were generated within its Tax Department but that tax lawyers in that department were centrally involved in their preparation and that Textron Financial also used an outside counsel to advise it on tax reserve requirements.

Textron described generically the contents of the work papers in question: these included (1) summary spreadsheets showing for each disputable item the amount in controversy, estimated probability of a successful challenge by the IRS, and resulting reserve amounts; and (2) back up e-mail and notes. In some instances the spreadsheet entries estimated the probability of IRS success at 100 percent. Textron said that the spreadsheets had been shown to and discussed with its independent auditor but physically retained by Textron.

Neither side disputed that the immediate purpose of the work papers was to establish and support the tax reserve figures for the audited financial statements. Textron's evidence was to the effect that litigation over specific items was always a possibility; the IRS did not deny that in certain cases litigation could result although it said that this was often unlikely. Whether Textron's evi-

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Douglas Carmichael, former chief auditor of the regulatory body for auditors of public companies (the Public Company Accounting Oversight Board); and Gary Kane, an IRS expert on tax accrual work papers.

dence is materially different than that of the IRS remains to be considered.

Ultimately, the district court denied the petition for enforcement. *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 150, 155 (D.R.I. 2007). The court agreed with the IRS that the agency had a legitimate purpose for seeking the work papers. *Id.* at 145. It also ruled that insofar as the Textron-prepared work papers might otherwise be protected by attorney-client privilege, or the counterpart tax practitioner privilege for non-lawyers engaged in tax practice, *see* 26 U.S.C. § 7525 (2006), those privileges had been waived when Textron disclosed the work papers' content to Ernst & Young. *Id.* at 152.

However, the district court concluded that the papers were protected by the work product privilege, which derived from *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure. This privilege, the district court held, had not been waived by disclosure of the work papers to the accountant. *Textron*, 507 F. Supp. 2d at 152-53. The district court's decision that the work papers were protected work product involved both a description of factual premises and a legal interpretation of applicable doctrine.

The district court first said (paraphrasing a Textron witness) the work papers were prepared to assure that Textron was "adequately reserved with respect to any potential disputes or litigation" over its returns; the court also said that, by fair inference, the work papers served "to satisfy an independent auditor that Textron's reserve for contingent liabilities satisfied the requirements of generally accepted accounting principles (GAAP) so that a 'clean' opinion would be given" for Tex-

tron financial statements. *Textron*, 507 F. Supp. 2d at 143.

Then, in its discussion of legal doctrine, the district court stated:

> As the IRS correctly observes, the work product privilege does not apply to "'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Maine*, 298 F.3d at 70 (quoting [*United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)]). However, it is clear that the opinions of Textron's counsel and accountants regarding items that might be challenged by the IRS, their estimated hazards of litigation percentages and their calculation of tax reserve amounts would not have been prepared at all "but for" the fact that Textron anticipated the possibility of litigation with the IRS . . . . Thus, while it may be accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a "clean" opinion from E&Y regarding the adequacy of the reserve amount, there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

Textron, 507 F. Supp. 2d at 150.

The court concluded that the work papers were therefore prepared "because of" the prospect of litigation, *Textron*, 507 F. Supp. 2d at 150, a phrase used in *Maine v. United States Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002). The court rejected the IRS' reliance on a Fifth Circuit decision rejecting work product protection for tax accrual work papers on the ground that the Fifth Circuit followed a different "primary purpose" test for work protect. *Textron*, 507 F. Supp. 2d at 150 (discussing *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984)).

On appeal, a divided panel upheld the district court's decision. The *en banc* court then granted the government's petition for rehearing *en banc*, vacated the panel decision, and obtained additional briefs from the parties and interested amici. We now conclude that under our own prior *Maine* precedent—which we reaffirm *en banc*—the Textron work papers were independently required by statutory and audit requirements and that the work product privilege does not apply.

The case presents two difficulties. One, which can readily be dispelled, stems from the mutability of language used in the governing rules and a confusion between issues of fact and issues of legal characterization. The other problem is more basic: how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic; here, two circuits have addressed tax accrual work papers in the work product context, but, apart from whatever light is cast by *Arthur Young*, the Supreme Court has not ruled on the issue before us, namely, one in which a document is not in any way prepared "for" litigation but relates to a subject that might or might not occasion litigation.

In origin, the work product privilege derives from the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. at 510-11, and focused at the outset on the materials that lawyers typically prepare for the purpose of litigating cases. *Hickman v. Taylor* concerned ongoing litigation in which one side filed interrogatories seeking from opposing counsel memoranda recording witness interviews that the latter had conducted after receiving notice of possible claims. Often such material and other items designed for use at trial (*e.g.*, draft briefs, outlines of cross examination) are not obtained from or shared with clients and are unprotected by the traditional attorney-client privilege.

Hickman v. Taylor addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497. The Court cited a privilege in English courts protecting

> [a]ll documents which are called into existence for the purpose-but not necessarily the sole purpose-of assisting the deponent or his legal advisers in any actual or anticipated litigation .... Reports ... if made in the ordinary course of routine, are not privileged ....

Id. at 510 n. 9.

This history led the Court to practical considerations:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue

> and needless interference . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . as the "work product of the lawyer."

Id. at 511.

On this basis the Court declared that the interrogatories, which sought witness interviews conducted by opponent counsel in preparation for litigation, were protected by a qualified privilege. *See id.* at 511-12. When in 1970 the Supreme Court through the rule-making process codified the work product privilege in Rule 26(b)(3), it described the privilege as extending to documents and other tangible things that "are prepared in anticipation of litigation or for trial." This phrase, as illuminated by *Hickman v. Taylor*'s reasoning, is the one to be applied in this case.

Turning back to the present case, the IRS is unquestionably right that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor. And Textron may be correct that unless the IRS might dispute an item in the return, no reserve for that item might be necessary, so perhaps some of the items might be litigated. But in saying that Textron wanted to be "adequately reserved," the district judge did not say that the work papers were prepared *for use* in possible litigation—only that the reserves would cover liabilities that might be determined in litigation. If the judge had made

a "for use" finding—which he did not—that finding would have been clearly erroneous.

That the purpose of the work papers was to make book entries, prepare financial statements and obtain a clean audit cannot be disputed. This was the testimony of IRS expert and former Chief Auditor of the Public Company Accounting Oversight Board Douglas Carmichael:

> Q. . . . Would you please explain what tax accrual workpapers are?
>
> A. . . . Tax accrual workpapers really include all the support for the tax assets and liabilities shown in the financial statements
>
> . . . .
>
> A. Well, from the company's perspective, they're created because, for example, for a public company, the key officers of the company sign a certification saying that those financial statements are fairly presented, and they need support for that.
>
> From the auditor's perspective, it's the same thing, the auditor needs to record in the workpapers what the auditor did to comply with generally accepted auditing standards. So the workpapers are the principal support for the auditor's opinion.
>
> Q. And why do public companies prepare financial statements?
>
> A. Usually, to meet requirements for raising capital. If they're a public company, they need to file annual financial statements on a form 10K with the SEC and quarterly information on a 10Q.

The Textron witnesses, while using the word "litigation" as often as possible in their testimony, said the same thing. Textron's testimony differed from that of the IRS expert only in its further assertion that, without the possibility of litigation, no tax reserves or audit papers would have been necessary. For example, Roxanne Cassidy, Textron's director of tax reporting, testified as follows:

> Q. . . . [W]hat was Textron's purpose in preparing those tax reserve papers?
>
> A. The purpose primarily was to determine whether Textron was adequately reserved with respect to any potential disputes or litigations that would happen in the future. We would need to ensure that we were adequately reserved in the current year on Textron's financial statements.
>
> . . .
>
> Q. And as a publicly traded company, is Textron required to file its financial statements with the Securities and Exchange Commission?
>
> A. Yes.
>
> Q. And do those financial statements include tax reserves?
>
> A. Yes . . . .
>
> . . .
>
> Q. And in having its tax reserves audited by an independent auditor, must Textron be able to support the determinations it

> has made regarding the adequacy of its tax reserves with some type of evidence?
>
> A. Yes, the support needs to be to the satisfaction of the auditors.

As the IRS expert stated, even if litigation were "remote," the company would still have to prepare work papers to support its judgment. Textron's own witness acknowledged that it would "have to include in its . . . tax accrual work papers any new transactions that the company entered into that year that there might be some tax exposure on" regardless of whether it anticipated likely litigation. Judged by Textron's own experience, most—certainly those with high percentage estimates of IRS success—would never be litigated.

To complete the story, we note *one* suggestion by one Textron witness that, if litigation did occur, the work papers could be useful to Textron in that litigation.[5] This assertion was not supported by any detailed explanation, was *not* adopted by the district judge and is more than dubious: the main aim of audit work papers is to estimate the amount potentially in dispute and the percentage chance of winning or losing. Even an academic supporter of Textron's legal position conceded that "it is doubtful that tax accrual workpapers, which typically just identify and quantify vulnerable return positions, would be useful in the litigation anticipated with respect to those posi-

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[5] Textron Vice President of Taxes Norman Richter said that Textron would still prepare tax accrual workpapers absent GAAP requirements "[b]ecause it guides us—it's—the analysis is still—it would guide us in making litigation and settlement decisions later in the process." This assertion was not contained in Richter's affidavit, which instead said that Textron prepared the work papers "to comply with GAAP" as required for reporting taxes to the SEC, and was not supported by detail or explanation in the record.

tions." Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 Houston Bus. & Tax L.J. 337, 346 (2008).

Any experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials. *Whether* work product protection should apply to such documents is a *legal* question informed by the language of rules and Supreme Court doctrine, direct precedent, and policy judgments. The first of these sources—Supreme Court doctrine and the wording of the rules—is helpful to the IRS; direct circuit precedent and the underlying policy of the doctrine and other prudential considerations are more helpful still. Legal commentators can be found on each side; the most persuasive of them favors the IRS.[6]

From the outset, the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated. Thus, *Hickman v. Taylor* addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel *in the course of preparation for possible litigation* after a claim has arisen." 329 U.S. at 497 (emphasis added). Similarly, the English privilege, invoked by *Hickman v. Taylor*, privileged "documents which are called into existence for *the purpose—but not necessarily the sole purpose—of assisting the*

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[6] *See* Ventry, *Protecting Abusive Tax Avoidance*, 120 Tax Notes 857, 870-83 (2008); Johnson, *The Work Product Doctrine and Tax Accrual Workpapers*, 124 Tax Notes 155, 160-68 (2009). The Pease-Wingenter article, *supra*, identifies many weaknesses in the Textron argument, *id.* at 343-48, although Pease now says her own ultimate view favors Textron.

deponent or his legal advisers in any actual or anticipated litigation." *Id.* at 510 n. 9 (emphasis added) (internal quotation marks omitted).

The phrase used in the codified rule—"prepared in anticipation of litigation or for trial" did not, in the reference to anticipation, mean prepared for some purpose other than litigation: it meant only that the work might be done *for* litigation but *in advance of* its institution. The English precedent, doubtless the source of the language in Rule 26, specified the purpose "of assisting the deponent or his legal advisers in any actual or anticipated litigation . . . ." The Advisory Committee's Note cited with approval a decision denying work product protection to a driver's accident report, made pursuant to Interstate Commerce Commission rules, even though it might well have become the subject of litigation. Fed. R. Civ. P. 26 advisory committee's note (1970).[7]

It is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated. Rather, as the Supreme Court explained, "the literal language of [Rule 26(b)(3)] protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *Federal Trade Commission v. Grolier Inc.*, 462 U.S. 19, 25 (1983) (emphasis added).

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[7] *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963). In *Goosman*, the Fourth Circuit denied work product protection to reports a truck driver made to the lessee and owner of the truck following an accident. The court explained that the reports "were made in the ordinary course of business under ICC regulations and do not represent the lawyer's work product within the holding in *Hickman v. Taylor.*" *Id.* at 52. *See also, e.g., Calabro v. Stone*, 225 F.R.D. 96, 99 (E.D.N.Y. 2004); *In re Raytheon Securities Litigation*, 218 F.R.D. 354, 359 (D. Mass. 2003).

This distinction is well established in the case law. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975).[8]

Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category. It is only work done in anticipation of or for trial that is protected. Even if prepared by lawyers and reflecting legal thinking, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed. R. Civ. P. 26 advisory committee's note (1970). *Accord Hickman v. Taylor*, 329 U.S. at 510 n. 9 (quoting English precedent that "[r]eports . . . if made in the ordinary course of routine, are not privileged").

Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (*i.e.*, "in anticipation of") law suit. They are the very materials catalogued in *Hickman v. Taylor* and the English precedent with which the decision began. No one with experience of law suits would talk about tax accrual work papers in those terms. A set of tax reserve figures, calculated for purposes of accurately stating a company's financial figures, has in ordinary parlance only that pur-

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[8] *Accord United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006) ("Nevertheless, the key issue in determining whether a document should be withheld is the function that the document serves."); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980) (same); *Church of Scientology Int'l v. IRS*, 845 F. Supp. 714, 723 (C.D. Cal. 1993) ("The Ninth Circuit test focuses on the function of a document as part of the deliberative process rather than on the contents of the document.").

pose: to support a financial statement and the independent audit of it.

Focusing next on direct precedent, work product protection for tax audit work papers has been squarely addressed only in two circuits: this one and the Fifth. In *Maine*, we said that work product protection does not extend to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Maine*, 298 F.3d at 70 (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)) (internal quotation marks omitted). *Maine* applies straightforwardly to Textron's tax audit work papers—which were prepared in the ordinary course of business—and it supports the IRS position.

Similarly, the Fifth Circuit in *El Paso* denied protection for the work papers because the court recognized that the company in question was conducting the relevant analysis because of a need to "bring its financial books into conformity with generally accepted auditing principles." 682 F.2d at 543. The Fifth Circuit, which employs a "primary purpose" test, found that the work papers' "sole function" was to back up financial statements. *Id.* at 543-44. Here, too, the only purpose of Textron's papers was to prepare financial statements.

Other circuits have not passed on tax audit work papers and some might take a different view. But many of the debatable cases affording work product protection involve documents unquestionably prepared for potential use in litigation if and when it should arise.[9] There is no

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[9] *See, e.g., Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (protection for "attorneys' assessment of . . . legal vulnerabilities in order to make sure it does not miss any-

evidence in this case that the work papers were prepared for such a use or would in fact serve any useful purpose for Textron in conducting litigation if it arose.

Finally, the underlying prudential considerations squarely support the IRS' position in this case, and such considerations have special force because *Hickman v. Taylor* was the child of such considerations, as the quotations above make clear. The privilege aimed centrally at protecting the *litigation process*, *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980), specifically, work done by counsel to help him or her in *litigating* a case. It is not a privilege designed to help the lawyer prepare corporate documents or other materials prepared in the ordinary course of business. Where the rationale for a rule stops, so ordinarily does the rule.

Nor is there present here the concern that *Hickman v. Taylor* stressed about discouraging sound preparation for a law suit. That danger may exist in other kinds of cases, but it cannot be present where, as here, there is in substance a legal obligation to prepare such papers: the tax audit work papers not only have a different purpose but *have* to be prepared by exchange-listed companies to comply with the securities laws and accounting principles for certified financial statements. *Arthur Young* made this point in refusing to create an accountant's work product privilege for tax audit papers:

> [T]he auditor is ethically and professionally obligated to ascertain for himself as far as possible whether the corporation's con-

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thing in crafting its legal case"); *see also In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998) (protection for documents to "protect the client from future litigation about a particular transaction").

> tingent tax liabilities have been accurately stated. . . . Responsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return.

465 U.S. at 818-19; *see also* Johnson, *supra*, at 160-61.

Textron apparently thinks it is "unfair" for the government to have access to its spreadsheets, but tax collection is not a game. Underpaying taxes threatens the essential public interest in revenue collection. If a blueprint to Textron's possible improper deductions can be found in Textron's files, it is properly available to the government *unless* privileged. Virtually all discovery against a party *aims* at securing information that may assist an opponent in uncovering the truth. Unprivileged IRS information is equally subject to discovery.[10]

The practical problems confronting the IRS in discovering under-reporting of corporate taxes, which is likely endemic, are serious. Textron's return is massive—constituting more than 4,000 pages—and the IRS requested the work papers only after finding a specific type of transaction that had been shown to be abused by taxpayers. It is because the collection of revenues is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS.

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[10] *See Abel Inv. Co. v. United States*, 53 F.R.D. 485, 488 (D. Neb. 1971) (holding that IRS documents created during an audit were not protected work product, despite containing attorneys' mental impression and legal theories, because an IRS audit is not litigation).

As Bentham explained, all privileges limit access to the truth in aid of other objectives, 8 Wigmore, *Evidence* § 2291 (McNaughton Rev. 1961), but virtually all privileges are restricted—either (as here) by definition or (in many cases) through explicit exceptions—by countervailing limitations. The Fifth Amendment privilege against self-incrimination is qualified, among other doctrines, by the required records exception, *see Grosso v. United States*, 390 U.S. 62, 67-68 (1968), and the attorney client privilege, along with other limitations, by the crime-fraud exception, *see Clark v. United States*, 289 U.S. 1, 15 (1933).

To sum up, the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements. Textron's work papers were prepared to support financial filings and gain auditor approval; the compulsion of the securities laws and auditing requirements assure that they will be carefully prepared, in their present form, even though not protected; and IRS access serves the legitimate, and important, function of detecting and disallowing abusive tax shelters.

The judgment of the district court is *vacated* and the case is *remanded* for further proceedings consistent with this decision.

It is so ordered.

TORRUELLA, Circuit Judge, with whom LIPEZ, Circuit Judge, joins, dissenting.

To assist the IRS in its quest to compel taxpayers to reveal their own assessments of their tax returns, the majority abandons our "because of" test, which asks whether "'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because*

of the prospect of litigation.'" *Maine v. United States Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002) (emphasis in original) (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). The majority purports to follow this test, but never even cites it. Rather, in its place, the majority imposes a "prepared for" test, asking if the documents were "prepared for use in possible litigation." Maj. Op. at 13. This test is an even narrower variant of the widely rejected "primary motivating purpose" test used in the Fifth Circuit and specifically repudiated by this court. In adopting its test, the majority ignores a tome of precedents from the circuit courts and contravenes much of the principles underlying the work-product doctrine. It also brushes aside the actual text of Rule 26(b)(3), which "[n]owhere . . . state[s] that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product." *Adlman*, 134 F.3d at 1198. Further, the majority misrepresents and ignores the findings of the district court. All while purporting to do just the opposite of what it actually does.

I. The Majority Quietly Rejects Circuit Precedent

The majority claims allegiance to our prior decision in *Maine*, 298 F.3d at 70. Specifically, the majority seizes upon a single line from that decision: "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Id.* (quoting *Adlman*, 134 F.3d at 1202). This qualification is important to be sure, and I will address it *infra*, Section III.B.2. But I must start by addressing the rest of the *Maine* decision, which the majority is careful to ignore.

In that decision, Maine sought documents prepared by the Department of the Interior regarding its decision, made during pending related litigation, to classify salmon as a protected species. *Id.* at 64. The district court found some of these administrative documents unprotected as the Department had not shown that litigation preparation was "'the primary motivating factor for the preparation of the documents.'" *Id.* at 66-67. This formulation of the test for "anticipation of litigation" was based on the Fifth Circuit rule that the work-product doctrine did not protect documents that were "not primarily motivated *to assist in* future litigation." *United States v. El Paso*, 682 F.2d 530, 542-43 (5th Cir. 1982) (emphasis added) (citing *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)). On appeal in *Maine*, we specifically repudiated this test and adopted the broader "because of" test, which had been thoughtfully and carefully explained by Judge Leval in the Second Circuit decision in *Adlman*, 134 F.3d at 1202-03. *See Maine*, 298 F.3d at 68 ("In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted in *Adlman* and by five other courts of appeals.").

In the present case, the majority purports to follow *Maine*, but really conducts a new analysis of the history of the work-product doctrine and concludes that documents must be "'*prepared for* any litigation or trial.'" Maj. Op. at 18 (emphasis in original) (quoting *FTC v. Grolier Inc.*, 462 U.S. 19, 25 (1983)). Similarly, at another point, the majority suggests that documents must be "for use" in litigation in order to be protected. *Id.* at 13. *Grolier* did not establish such a test and the majority can

point to no court that has so ruled.[11] Rather, the majority of circuit courts, led by the Second Circuit's decision in *Adlman*, have rejected such a rule.

Adlman's articulation of the "because of" test is fatal to the majority's position. In that case, Judge Leval discussed the application of the work-product doctrine "to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." *Adlman*, 134 F.3d at 1197. In other words, *Adlman* asked whether the work-product doctrine applies where a dual purpose exists for preparing the legal analysis, that is, where the dual purpose of anticipating litigation and a business

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[11] To support its conclusion, the majority commits a plain logical error. The majority states that work-product protection must not be judged solely on its subject matter, but rather whether the documents's purpose is *for use* in litigation. In support of this proposition, the majority cites a number of cases that propound the uncontroversial proposition that a document must be judged according to its purpose, not solely its content. Maj. Op. at 18 n.8. But those cases do not establish the majority's rule that the documents' purpose *must be limited to use in litigation*. Rather, one of the cases the majority cites adopts the test that the document must have been created "because of" litigation, which, as *Adlman* describes, is antithetical to the majority's new requirement. *United States v. Roxworthy*, 457 F.3d 590, 593-94 (6th Cir. 2006) (adopting *Adlman*'s "because of" test). Another of the majority's citations is from the D.C. Circuit, which has also since adopted the "because of" test. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 587 n.42 (D.C. Cir. 1987). The final decision cited by the majority, from the Northern District of California, deals with the deliberative process privilege, not the work-product doctrine. *Church of Scientology Int'l v. IRS*, 845 F. Supp. 714, 723 (C.D. Cal. 1993). In any event, the Ninth Circuit also applies the "because of" test. *In re Grand Jury Subpoena*, 357 F.3d 900, 907-08 (9th Cir. 2004) (praising and following *Adlman*).

purpose co-exist. To answer that question, the *Adlman* court examined and rejected the "primary purpose" test adopted by the Fifth Circuit in *El Paso*, 682 F.2d at 542-43, which only grants work-product immunity to work-papers prepared "primarily motivated to assist in future litigation over the return," *id.* at 543:

> [Protection] is less clear, however, as to documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation. The formulation applied by some courts in determining whether documents are protected by work-product privilege is whether they are prepared "primarily or exclusively to assist in litigation"—a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision. Others ask whether the documents were prepared "because of" existing or expected litigation—a formulation that would include such documents, despite the fact that their purpose is not to "assist in" litigation. Because we believe that protection of documents of this type is more consistent with both the literal terms and the purposes of the Rule, we adopt the latter formulation.

Adlman, 134 F.3d at 1197-98, *quoted in part in Maine*, 298 F.3d at 68. And if it needs to be spelled out any more clearly, *Adlman* makes it explicitly clear that the broader "because of" formulation is not limited to documents prepared *for use* in litigation:

We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient.

The text of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial. To the contrary, the text of the Rule clearly sweeps more broadly. It expressly states that work-product privilege applies not only to documents "prepared . . . for trial" but also to those prepared "in anticipation of litigation." If the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase "prepared . . . for trial." The fact that documents prepared "in anticipation of litigation" were also included confirms that the drafters considered this to be a different, and broader category. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the making of a business decision do not fall within its scope.

Id. at 1198-99 (emphasis and alterations in original). Rather than confront this language, the majority resorts to simplistic generalizations. Using its novel "prepared for" test, the majority unhelpfully explains that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . law suit." Maj. Op. at 19. Once the majority ignores decades of controlling precedent, the matter becomes so clear that "[n]o one with experience of law suits" could disagree. *Id.*

I need say little else; the majority's new "prepared for" rule is blatantly contrary to *Adlman*, a leading case interpreting the work-product doctrine that we specifically adopted in *Maine*. The majority's opinion is simply stunning in its failure to even acknowledge this language and its suggestion that it is respecting rather than overruling *Maine*.

II. The Majority Announces a Bad Rule

The majority acts as if it is left to this court to draw a line from *Hickman* to the present case. In so doing, the majority ignores a host of cases which grapple with tough work product questions that go beyond the stuff that "[e]very lawyer who tries cases" would know is work product. Lower courts deserve more guidance than a simple reassurance that a bare majority of the en banc court knows work product when it sees it.[12] Of course,

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[12] This test is reminiscent of Justice Stewart's famously unhelpful test for identifying obscenity:

> [C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it

since this is an en banc proceeding, the majority is free to create a new rule for the circuit—though it would be better if it admitted that it was doing so. But our new circuit rule is not even a good rule.

First, as Judge Leval observed in *Adlman*, a "prepared for" requirement is not consistent with the plain language of Federal Rule of Civil Procedure 26, which provides protection for documents "prepared in anticipation of litigation *or* for trial." Fed. R. Civ. P. 26(b)(3)(A) (emphasis added); *see also Adlman*, 134 F.3d at 1198-99. There is no reason to believe that "anticipation of litigation" was meant as a synonym for "for trial." Claudine Pease-Wingenter, *Prophetic or Misguided? The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 Rev. Litig. (forthcoming 2009) (analyzing and rejecting many of the arguments advanced by the majority in favor of a narrow construction of the phrase "anticipation of litigation"). Since the terms are not synonymous, the term "anticipation of litigation" should not be read out of the rule by requiring a showing that documents be prepared for trial. *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009) (discussing the basic principle that statutes should be construed to give effect to each word).

Second, though the majority goes into some depth describing the foundational case of *Hickman v. Taylor*, 329 U.S. 495 (1947), it misses the fundamental concern of that decision with protecting an attorney's "privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Without such privacy, litigants

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> when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

would seek unfair advantage by free-riding off another's work, thus reducing lawyers' ability to write down their thoughts:

> Were the attorney's work accessible to an adversary, the *Hickman* court cautioned, "much of what is now put down in writing would remain unwritten" for fear that the attorney's work would redound to the benefit of the opposing party. Legal advice might be marred by "inefficiency, unfairness and sharp practices," and the "effect on the legal profession would be demoralizing." Neither the interests of clients nor the cause of justice would be served, the court observed, if work product were freely discoverable.

Adlman, 134 F.3d at 1197 (quoting *Hickman*, 329 U.S. at 511) (citations omitted). The majority posits that these rationales do not apply to documents containing a lawyer's legal analysis of a potential litigation, if that analysis was prepared for a business purpose. Maj. Op. at 21. This is both unpersuasive and directly contrary to the policy analysis in *Adlman*, which we adopted in *Maine*. *Adlman* identified an example of a protected document:

> A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in evaluating future courses of action. Financial statements include reserves for projected litigation. The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying

> analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses.

Id. at 1200. Discussing this example, the court concluded that in this scenario "the company involved would require legal analysis that falls squarely within *Hickman*'s area of primary concern—analysis that candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." *Id.* Further, there is "no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance." *Id.* In other words,

> [i]n addition to the plain language of the Rule, the policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision. Framing the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine.

Id. at 1199; *see also Roxworthy*, 457 F.3d at 595 (stating "the IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged.").

The majority offers no response to this sound policy analysis and no reason to doubt that inefficiency and "sharp practices" will result from its new rule allowing discovery of such dual purpose documents, which contain confidential assessments of litigation strategies and chances. Instead of addressing these concerns, the majority's policy analysis relies instead on case-specific rationales—namely the need to assist the IRS in its difficult task of reviewing Textron's complex return. *See* Maj. Op. at 22-23. Such outcome determinative reasoning is plainly unacceptable. Thus, properly framed, it is clear that the rationales underlying the work-product doctrine apply to documents prepared in anticipation of litigation, even if they are not also for use at trial.[13]

And these policy rationales are squarely implicated in this case. First, Textron's litigation hazard percentages contain exactly the sort of mental impressions about the case that *Hickman* sought to protect. In fact, these percentages contain counsel's ultimate impression of the value of the case. Revealing such impressions would have clear free-riding consequences. With this information, the IRS will be able to immediately identify weak spots and know exactly how much Textron should be willing to spend to settle each item. Indeed, the IRS explicitly admits that this is its purpose in seeking the documents.

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[13] Perhaps because of these very same concerns about privacy and fairness, the IRS itself argued for the protection of its documents prepared for the dual purposes of helping the IRS understand the litigation risks that might result if the IRS made the administrative decision to adopt a new program. *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987). This point was also noted by the *Adlman* court when it observed that "the IRS successfully argued against the very position it here advocates." *Adlman*, 134 F.3d at 1201.

Second, as argued to us by amici, the Chamber of Commerce of the United States and the Association of Corporate Counsel, if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid putting it in writing, thus diminishing the quality of representation. The majority dismisses such concerns, concluding that tax accrual workpapers are required by law. Maj. Op. at 21. But the majority fails to cite the record for this conclusion, likely because the majority is simply wrong. As the majority opinion earlier admits, Maj. Op. at 2-3, the law only requires that Textron prepare audited financial statements reporting total reserves based on contingent tax liabilities. Accounting standards require some evidential support before such statements can be certified, but do not explicitly require the form and detail of the documents prepared here by Textron's attorneys with respect to each potentially challenged tax item. *See also* Michelle M. Henkel, *Textron: The Debate Continues as to Whether Auditor Transparency Waives the Work Product Privilege*, 50 Tax Management Memorandum 251, 260 (2009) (distinguishing auditor's workpapers and corporate workpapers and explaining that the latter are not mandatory but serve to evaluate a company's litigation risks). Rather, all that must be actually reported is the final tax reserve liability amount. Thus, as amici worry, the majority's new rule will have ramifications that will affect the form and detail of documents attorneys prepare when working to convince auditors of the soundness of a corporation's reserves.

These concerns are even more clearly implicated in this case because the majority's decision will remove protection for Textron's "backup materials" as well as its

actual workpapers. The district court found that these materials included "notes and memoranda written by Textron's in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of litigation percentage that should apply to each item." *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 143 (D.R.I. 2007). Thus, these documents thus go beyond the numbers used to compute a total reserve. Rather, they explain the legal rationale underpinning Textron's views of its litigation chances. The majority fails to acknowledge this subtlety, explain why it views such documents as required by regulatory rules, or explain why such mental impressions should go unprotected. Exposing such documentation to discovery is a significant expansion of the IRS's power and will likely reveal information far beyond the basic numbers that the IRS could discover through production of Textron's auditor's workpapers.

But more important are the ramifications beyond this case and beyond even the case of tax accrual workpapers in general. The scope of the work-product doctrine should not depend on what party is asserting it. Rather, the rule announced in this case will, if applied fairly, have wide ramifications that the majority fails to address.

For example, as the IRS explicitly conceded at oral argument, under the majority's rule one party in a litigation will be able to discover an opposing party's analysis of the business risks of the instant litigation, including the amount of money set aside in a litigation reserve fund, created in accordance with similar requirements as Textron's tax reserve fund. Though this consequence was a major concern of the argument in this case, the majority does not even consider this "sharp practice," which its new rule will surely permit.

And there are plenty more examples. Under the majority's rule, there is no protection for the kind of documents at issue in *Adlman*, namely "documents analyzing anticipated litigation, but prepared to assist in a business decision rather than to assist in the conduct of the litigation." 134 F.3d at 1201-02. Nearly every major business decision by a public company has a legal dimension that will require such analysis. Corporate attorneys preparing such analyses should now be aware that their work product is not protected in this circuit.

III. The Workpapers Are Protected Under the Right Test

Applying the "because of" test thoughtfully adopted in *Adlman* and *Maine*, the majority should have concluded that Textron's workpapers are protected by the work-product doctrine. The proper starting point in reaching this legal conclusion should be the factual findings of the district court, which held an evidentiary hearing to understand the nature of the documents sought here by the IRS.

A. Factual findings

After considering affidavits and testimony, the district court found that the tax accrual workpapers are:

> 1. A spreadsheet that contains:
>
> (a) lists of items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and, therefore, may be challenged by the IRS;
>
> (b) *estimates by Textron's counsel expressing, in percentage terms, their judgments regarding Textron's chances of prevailing*

> *in any litigation over those issues (the "hazards of litigation percentages");* and
>
> (c) the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation (the "tax reserve amounts").

Textron, 507 F. Supp. 2d at 142-143 (emphasis added). These workpapers do not contain any facts about the transactions that concerned the IRS. *Id.* at 143.

The district court also found, "[a]s stated by Norman Richter, Vice President of Taxes at Textron and Roxanne Cassidy, Director, Tax Reporting at Textron, Textron's ultimate purpose in preparing the tax accrual workpapers was to ensure that Textron was 'adequately reserved with respect to any potential disputes or litigation that would happen in the future.'" *Id.* at 143. Further, "there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding." *Id.* at 150.

In addition to recognizing these litigation purposes, the district court also recognized the dual purposes driving the creation of these documents and found that the workpapers' creation "also was prompted, in part" by the need to satisfy Textron's auditors and get a "clean" opinion letter. *Id.* at 143. The district court later clarified:

> Thus, while it may be accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a "clean" opinion from [the auditor] regarding the adequacy of the reserve amount,

> there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

Id. at 150. Relatedly, the district court found that anticipation of litigation was the "but for" cause of the documents' creation. *Id.* Thus, the district court clearly found two purposes leading to the creation of the workpapers.

The majority makes no effort to reject these factual findings, but simply recharacterizes the facts as suits its purposes. For example, the majority declares, without reference to the district court's more nuanced findings, that the "the IRS is unquestionably right that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor." Maj. Op. at 12-13. At another point, the majority boldly pronounces, "the only purpose of Textron's papers was to prepare financial statements." *Id.* at 20. Of course, as explained above, the district court's factual findings about Textron's "ultimate purpose" were directly contrary to these pronouncements. Discarding a district court's factual finding on causation without any demonstration of clear error is not within this court's proper appellate function. *See* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *see also Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir. 1980) (noting that clear error review applies even when "much of the evidence is docu-

mentary and the challenged findings are factual inferences drawn from undisputed facts").

Instead, the majority exalts in the fact that the district court made no finding that the documents were "*for use* in possible litigation." Maj. Op. at 13. That proposition is true. But, as described above, "for use" (i.e. "prepared for") is not and has never been the law of this circuit.

The majority does suggest that the documents business purpose "cannot be disputed." *Id.* This is also uncontroversial. The district court found both a litigation and a business purpose. But, in straining to ignore the documents' litigation purposes, the majority proceeds to rely heavily on the IRS's expert. In so doing, the majority makes no effort to explain why the district court should have been required to adopt the view that the workpapers existed only for a non-litigation purpose. The majority claims that Textron's witnesses agreed with the IRS expert, but the majority fails to reconcile this proclamation with the competing view of Textron's witnesses, which the district court explicitly relied upon in its factual findings regarding Textron's "ultimate purpose." *Textron*, 507 F. Supp. 2d at 143. This is another corruption of the proper role of an appellate court. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

The majority does suggest that the district court's findings regarding the cause of the workpapers' creation was only stated in its legal analysis section. Maj. Op. at 9. But the actual purpose of the documents' creators, or, in the words of the district court, "but-for" causation, is a

factual issue, and the majority makes no effort to explain why such issue should be reviewed as a legal conclusion.

The majority also proclaims, without record support, that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." Maj. Op. at 15. As described above, this conclusion reverses, without any finding of clear error, the district court's factual findings. Further, this language dangerously suggests that this court can, from its general knowledge, offer an expert opinion as to how such documents are always seen by "experienced litigators." Another of the many errors of this approach is revealed by reference to undisputed record testimony. Namely, the majority's assumption that tax accrual workpapers are a uniform class from corporation to corporation is simply wrong. When the district court carefully and specifically defined what documents were actually at issue in this case, it explained that "there is no immutable definition of the term 'tax accrual papers,'" and that their content varies from case to case, *Textron*, 507 F. Supp. 2d at 142, a conclusion that is consonant with the testimony of the government's expert. *Id.* at 142 n.2. Thus, even were it not our rule that we defer to the district court's factfinding, such a rule would make good sense in handling the wide range of workpapers likely to confront district courts in the future as the IRS increasingly seeks their discovery.

Even if we looked at the purpose of tax accrual workpapers as a general matter, the district court's conclusion that Textron's anticipation of litigation drove its reporting obligations is not so outrageous as to leave us with a firm conviction of error. Rather, other courts reviewing similar kinds of documents have reached similar conclusions. *Regions Fin. Corp. & Subsidiaries v. Unit-*

ed States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *6 (N.D. Ala. May 8, 2008) (concluding, in examining another company's workpapers that "[w]ere it not for anticipated litigation, Regions would not have to worry about contingent liabilities and would have no need to elicit opinions regarding the likely results of litigation"); *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 901 N.E.2d 1185, 1191, 1205 (2009) (affirming a finding of work-product protection for a business memorandum analyzing the "pros and cons of the various planning opportunities and the attendant litigation risks" since the author "had 'the prospect of litigation in mind when it directed the preparation of the memorandum'" and would not have been prepared irrespective of that litigation (quoting *Adlman*, 134 F.3d at 1204)).

B. Analysis

This court should accept the district court's factual conclusion that Textron created these documents for the purpose of assessing its chances of prevailing in potential litigation over its tax return in order to assess risks and reserve funds. Under these facts, work-product protection should apply.

1. The "because of" test

First, the majority does not develop any analysis contesting the proposition that disputes with the IRS in an audit can constitute litigation, within the meaning of Fed. R. Civ. P. 26(b)(3)(A). Indeed, such a conclusion is clear. For these purposes, the touchstone of "litigation" is that it is adversarial. *See* Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000). Though the initial stages of a tax audit may not be adversarial, the disputes themselves are essentially adversarial; the sub-

ject of these disputes will become the subject of litigation unless the dispute is resolved.

Applying the "because of" test as articulated in *Adlman* and *Maine*, the workpapers are protected. Under these precedents, a document is protected if, "'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation.'" *Maine*, 298 F.3d at 68 (emphasis in original) (quoting *Adlman*, 134 F.3d at 1202). The "because of" test "really turns on whether [the document] would have been prepared irrespective of the expected litigation with the IRS." *Adlman*, 134 F.3d at 1204. As the district court found, the driving force behind the preparation of the documents was the need to reserve money in anticipation of disputes with the IRS. *Textron*, 507 F. Supp. 2d at 143. Though other business needs also contributed to Textron's need to create the documents, those needs depended on Textron's anticipating litigation with the IRS. In other words, without the anticipation of litigation, there would be no need to estimate a reserve to fund payment of tax disputes. *Id.* at 150. In this way, the dual purposes leading to the documents' creation were intertwined, and work-product protection should apply. *See In re Grand Jury Subpoena*, 357 F.3d at 910 ("The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole."); *see also* Andrew Golodny, *Note: Lawyers versus Auditors: Disclosure to Auditors and Potential Waiver of Work-Product Privilege in United States v. Textron*, 61 Tax Law. 621, 629 (2008) ("As a commentator noted, 'in the case of tax contingency reserves, the prospect of fu-

ture litigation and the business need for the documents are so intertwined that the prospect of future litigation itself creates the business need for the document.'" (quoting Terrence G. Perris, *Court Applies Work Product Privilege to Tax Accrual Workpapers*, 80 Prac. Tax. Strategies 4 (2008))).

The majority simply refuses to accept the district court's finding that the documents would not exist but for Textron's need to anticipate litigation. This rejection is essential to the majority's erroneous conclusion. Accepting the district court's findings regarding purpose compels a finding of work-product protection, since the precedents are clear that under the "because of" test, dual purpose documents are protected. In fact, that is one of the very reasons some courts have adopted the test. 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2024 (2d ed. 2009) ("'Dual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose."); *see also Roxworthy*, 457 F.3d at 598-99 ("[D]ocuments do not lose their work product privilege 'merely because [they were] created in order to assist with a business decision,' unless the documents 'would have been created in essentially similar form irrespective of the litigation.'" (quoting *Adlman*, 134 F.3d at 1202)); *In re Grand Jury Subpoena*, 357 F.3d at 907 (adopting Wright and Miller's "because of" test in order to handle "dual purpose" documents); *Maine*, 298 F.3d at 68 (adopting *Adlman* after recounting the distinction between the "because of" test and the "primary purpose" test in their handling of dual purpose documents); *Adlman*, 134 F.3d at 1197-98, 1202 ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose pro-

tection under this formulation merely because it is created in order to assist with a business decision."); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 61 (7th Cir. 1980) ("We conclude that the materials . . . were indeed prepared in anticipation of litigation, even though they were prepared as well for the filing of the Board of Elections reports.").

2. The exception to the "because of" test

The majority reads too much into one sentence from *Maine* and *Adlman*. Specifically, it is true that "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Maine*, 298 F.3d at 70 (quoting *Adlman*, 134 F.3d at 1202). This proviso relates to the advisory notes to the rule, which excludes from protection "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." Fed. R. Civ. P. 26 advisory committee's note (1970). Understood in light of the fact that the "because of" test unequivocally protects "dual purpose" documents, this proviso does not strip protection for dual purpose documents that have one business or regulatory purpose. Rather, the best reading of the advisory committee's note is simply that preparation for business or for public requirements is preparation for a nonlitigation purpose insufficient in itself to warrant protection. The note states that there is no protection for documents created for business, regulatory, or "other nonlitigation purposes." This language suggests the note is considering business and regulatory purposes as nonlitigation purposes, but does not suggest that the presence of such a purpose should somehow override a litigation purpose, should one

exist. Thus, correctly formulated, this exception should be understood as simply clarifying the rule that dual purpose documents are protected, though "there is no work-product immunity for documents prepared in the regular course of business *rather than* for purposes of the litigation." Wright & Miller, *supra*, § 2024 (emphasis added); *see also Roxworthy*, 457 F.3d at 599 ("[A] document can be created for both use in the ordinary course of business and in anticipation of litigation without losing its work-product privilege."). Under the majority's interpretation, the exception swallows the rule protecting dual purpose documents.

So understood, the exception does not control this case. After citing this exception, the district court concluded that the documents were not created irrespective of litigation because Textron would not have prepared the documents but for the anticipation of litigation. *Textron*, 507 F. Supp. 2d at 150. The majority makes no effort to label this finding clearly erroneous. To the contrary, the finding is correct. The tax accrual workpapers identify specific tax line items, and then anticipate the likelihood that litigation over those items will result in Textron having to pay the IRS more money. That Textron will not ultimately litigate each position does not change the fact that when it prepared the documents, Textron was acting to anticipate and analyze the consequences of possible litigation, just like the memorandum example in *Adlman*, 134 F.3d at 1200. The documents would not be the same at all had Textron not anticipated litigation. So, under the "because of" test, as applied in *Adlman* and the many circuit courts that have followed it, these documents were not prepared "irrespective" of the prospect of litigation. They should be protected.

3. *Arthur Young* and *El Paso* do not control

Neither the Supreme Court's decision in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), nor the Fifth Circuit's decision in *El Paso*, 682 F.2d at 530, support a different result.

In *Arthur Young*, the Court declined to recognize an accountant's work-product doctrine, thus holding that tax accrual workpapers created by an independent auditor were not protected. *Arthur Young*, 465 U.S. at 815-21. But unlike the Court in *Arthur Young*, we are not now confronted with the question of whether to recognize a new privilege. Here, the doctrinal decision we face is how to apply existing work-product doctrine to the present facts, in other words whether the "because of" test protects dual purpose documents, as the *Maine* and *Adlman* courts so held. This question was not at all presented in *Arthur Young*.

On the other hand, *El Paso* is clearly factually on point—there the Fifth circuit rejected work-product protection for similar tax accrual workpapers. *El Paso*, 682 F.2d at 542. But, as explained above, that court applied a different definition of the work-product doctrine, asking whether the "primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Id.* at 542-44 (concluding that the document should not be protected as it "carries much more the aura of daily business than it does of courtroom combat"). Finding Textron's workpapers protected would not *create* a circuit split, but be merely an application of a widely acknowledged existing difference between our law and the law of the Fifth Circuit. It is precisely in these "dual purpose" situations that the "because of" test used in this circuit is meant to distinguish itself from the "primary purpose" test used in the Fifth Circuit. *Maine*,

298 F.3d at 68 (citing *Adlman* for the proposition that the primary purpose test "is at odds with the text and the policies of Rule 26 because nothing in it suggests that documents prepared for dual purposes of litigation and business or agency decisions do not fall within its scope"). Thus, unlike the Fifth Circuit, we need not assess whether the tax accrual workpapers carry more of one "aura" than another.

IV. Conclusion

The majority's decision may please the IRS and some tax scholars who understandably see discovery of tax accrual workpapers as an important tool in combating fraud. But this decision will be viewed as a dangerous aberration in the law of a well-established and important evidentiary doctrine. Whatever else one may think about this case, the majority's assertion that it is following *Maine* is plainly erroneous. Rather, the majority's "prepared for" test is directly contrary to *Adlman*, a decision we explicitly adopted in *Maine*.

In straining to craft a rule favorable to the IRS as a matter of tax law, the majority has thrown the law of work-product protection into disarray. Circuits have already split interpreting the meaning of "anticipation of litigation," between the "primary purpose" and "because of" tests. Now this court has proceeded to further the split by purporting to apply the "because of" test while rejecting that test's protection for dual purpose documents. In reality, the majority applied a new test that requires that documents be actually "prepared for" use in litigation. The time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country.

The correct test is that spelled out in *Adlman*, and adopted by most circuit courts. Applying that test to the facts actually found by the district court, these tax accrual workpapers should be protected. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2631

UNITED STATES OF AMERICA, Petitioner, Appellant,

v.

TEXTRON INC. AND SUBSIDIARIES, Respondent, Appellee.

January 21, 2009

Before TORRUELLA, BOUDIN, Circuit Judges, and SCHWARZER,* District Judge.

TORRUELLA, Circuit Judge.

The question presented by this appeal is whether the work-product doctrine protects documents prepared by Textron Inc. for the purpose of calculating tax reserve liability from production to the IRS pursuant to an investigative subpoena. Like other companies, Textron prepares "tax accrual workpapers" which, generally speaking, list the questionable positions Textron took on its

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*Of the Northern District of California, sitting by designation.

tax returns, estimate the likelihood that those positions will not withstand scrutiny, and calculate the amount of additional tax liability that would result from revision of those positions. Textron prepares these estimates so that it can maintain an adequate reserve fund, properly report its assets and liabilities, and obtain independent certification of its financial statements. As part of the auditing process, Textron showed these tax accrual workpapers to Ernst & Young ("E&Y") an independent auditor.

This case arose when the Internal Revenue Service ("IRS"), after noticing potential tax shelter transactions, issued an administrative summons to Textron pursuant to I.R.C. § 7602 seeking tax accrual workpapers for Textron's 2001 tax returns. Textron refused to comply and asserted a number of defenses. The IRS sued to enforce the subpoena. After an evidentiary hearing, the district court ruled for Textron on its work-product protection claim, but rejected its other defenses. The district court also found that Textron's disclosure to E&Y did not constitute waiver. The IRS appeals. After careful review,[1] we affirm in part, vacate in part, and remand.

I. Background

The IRS subpoena sought "Tax Accrual Workpapers," defined as:

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[1] Textron was joined by amici curiae Committee on Taxation and Committee on Corporate Reporting of Financial Executives International, Chamber of Commerce of the United States of America, and Association of Corporate Counsel. The IRS has submitted two scholarly articles which we have considered: Dennis J. Ventry, Jr., *Protecting Abusive Tax Avoidance*, 120 Tax Notes 857 (2008); and Claudine Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 Houston Bus. & Tax L.J. 337 (2008).

> [A]ll accrual and other financial workpapers or documents created or assembled by the Taxpayer, an accountant for the Taxpayer, or the Taxpayer's independent auditor relating to any tax reserve for current, deferred, and potential or contingent tax liabilities, however classified or reported on audited financial statements, and to any footnotes disclosing reserves or contingent liabilities on audited financial statements. They include, but are not limited to, any and all analyses, computations, opinions, notes, summaries, discussions, and other documents relating to such reserves and any footnotes.

The subpoena sought all documents in the actual or constructive possession, custody, or control of Textron or its accountants. The district court held oral arguments where the government reiterated that it was seeking tax accrual documents prepared by Textron or E&Y. Textron argued that it had created the documents in anticipation of a dispute with the IRS regarding its tax returns.

The district court then held an evidentiary hearing on the types of documents included in the definition of "tax accrual workpapers" and the basis for Textron's work product claim. At the evidentiary hearing, the IRS's expert witness, Professor Douglas Carmichael, testified that securities law requires that public companies obtain a letter from an independent auditor approving the company's financial statements, and that part of that audit was an analysis of the company's reserves for covering tax loss. Textron's former Director of Tax Reporting, Roxanne Cassidy, countered that the tax accrual work-

papers were created "to determine whether Textron was adequately reserved with respect to any potential disputes or litigations that would happen in the future." Cassidy and Norman Richter, Textron tax counsel, explained that the tax accrual workpapers listed positions Textron was taking on its tax returns that might require that a reserve be set aside. These positions were then analyzed by Textron attorneys who estimated a percentage likelihood that the position would not prevail if challenged by the IRS. Textron calls this the "hazards of litigation percentage." The reserve requirement was calculated by multiplying this percentage times the tax benefit claimed.

In response, Carmichael, the IRS expert witness, contended that public companies prepare these papers every year to comply with securities law regardless of whether they expect litigation. But, Richter testified that the tax accrual workpapers were prepared under the assumption that issues identified would be challenged by the IRS and would need to be defended. He further testified that if Textron did not anticipate any disputes, the tax accrual workpapers would be blank. The IRS disagreed, arguing that some workpapers would nevertheless be necessary to handle deferred taxes or to justify setting aside no tax reserve.

It was undisputed that the IRS audits every Textron return in multi-year cycles. Testimony also showed that in each audit cycle hundreds of IRS adjustments to Textron's returns were simply accepted by Textron. Where Textron and the IRS do dispute tax liability, their dispute could be resolved through a conference with the audit team, by presentation of arguments to the IRS Office of Appeals, or, ultimately, federal court litigation. In seven of the last eight audit cycles, Textron and the IRS

have brought at least one issue to the IRS Office of Appeals. Between 1959 and present, Textron and the IRS have litigated three disputes in federal court. Textron admitted that it expected to concede several issues identified in the workpapers, and that the percentage for those issues was listed as "100%." Textron explained that those items were due to instances where legal developments rendered a prior position undefendable.

IRS agents explained that access to the workpapers would help them navigate Textron's 4000 page tax return which was accompanied by "9 four-drawer file cabinets" of paper. The IRS witnesses explained that the tax accrual workpapers would help the IRS understand the substance of a transaction and could help the IRS identify potential issues with Textron's return. An agent testified that in 2006 the IRS adopted the policy of seeking tax accrual workpapers when the audit team becomes aware (sometime through self-reporting) of certain transactions by the taxpayer which potentially constitute abusive tax shelters.

As to the waiver issue, the IRS's expert, Carmichael, testified that companies create these tax accrual workpapers, knowing that they will be shared with an auditor. Evidence also showed that the auditor's code of ethics requires information be kept confidential unless required to be produced in response to a subpoena or other legal obligation. Mark Weston, a partner at E&Y, submitted an affidavit explaining these confidentiality obligations and further stating that E&Y had not in fact disclosed any information regarding Textron's 2001 tax accrual computations. But the IRS expert opined that auditors ultimately owe an allegiance to the investing public and have legal obligations of disclosure in some instances.

Textron countered that it let E&Y look at its tax accrual workpapers, but did not allow E&Y to retain a copy of them. Debra Raymond, a Textron tax manager, averred that she had reviewed E&Y's files and that E&Y did not in fact retain a copy of Textron's workpapers.

The IRS subpoena also requested any tax-accrual documents prepared by E&Y regarding Textron. After the evidentiary hearing, the district court found that the "tax accrual workpapers" at issue did not include facts about the issues they identified, and could be described as follows:

> 1. A spreadsheet that contains:
>
> (a) lists of items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and, therefore, may be challenged by the IRS;
>
> (b) estimates by Textron's counsel expressing, in percentage terms, their judgments regarding Textron's chances of prevailing in any litigation over those issues (the "hazards of litigation percentages"); and
>
> (c) the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation (the "tax reserve amounts").
>
> 2. Backup workpapers consisting of the previous year's spreadsheet and earlier drafts of the spreadsheet together with notes and memoranda written by Textron's in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of liti-

> gation percentage that should apply to each item.

United States v. Textron Inc., 507 F. Supp. 2d 138, 142-143 (D.R.I. 2007). The government objects on appeal that the district court did not include in this definition any tax accrual workpaper that E&Y prepared in its audit of Textron.

The district court then found that the subpoenaed documents were relevant, requested for a proper purpose, and were privileged attorney-client communications. *Id.* at 143-48. But, the district court found that the attorney-client privilege was waived by disclosure to E&Y. *Id.* at 151-52.

As to the work-product protection claim, the district court credited Textron's testimony that its ultimate purpose in preparing the tax accrual workpapers was to ensure that it was "'adequately reserved with respect to any potential disputes or litigation that would happen in the future.'" *Id.* at 143 (quoting the testimony of Norman Richter). The court found that this desire to ensure adequate reserves was also prompted, in part, by its wish to satisfy independent auditors that Textron had properly reported its financial information. *Id.* at 150. The court acknowledged the First Circuit's "because of" test for determining whether documents were prepared in anticipation of litigation and recognized that under that test there is no protection for "'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Id.* (quoting *Maine v. United States Dep't of the Interior*, 298 F.3d 60, 70 (1st Cir. 2002)). The district court then held that the tax accrual workpapers "would not have been prepared at all 'but for' the fact that Textron anticipated the possibility of litigation with

the IRS." *Id.* The district court reasoned that while the papers were used to obtain a favorable opinion letter from E&Y regarding Textron's reserves, there would have been no need for such reserves "if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding." *Id.* The IRS appeals the conclusion that the work-product doctrine protects the tax accrual workpapers.

The district court then noted that the standard for waiver of the work-product protection was different than for attorney-client privilege. *Id.* at 152. The district court concluded that disclosure of Textron's tax accrual workpapers to E&Y did not effect a waiver since disclosure "did not substantially increase the IRS's opportunity to obtain the information contained in them." *Id.* at 153. The district court based its decision on E&Y's professional confidentiality obligations and the fact that E&Y averred that it had not actually disclosed the information. *Id.*[2] The IRS also appeals this conclusion.

The district court then ruled that the government could not make the showing needed to overcome work-product protection since the government sought Textron's "mental impressions, conclusions, opinions or legal theories." *Id.* at 154 (internal quotations omitted). The IRS does not appeal this conclusion.

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[2] The district court also found that E&Y had promised to keep the documents confidential. The IRS contends that this fact is not supported in the record. As explained infra n.10, we need not decide this dispute.

II. Discussion

Three issues are thus presented for appeal: (1) whether the work-product doctrine protects Textron's workpapers; (2) whether any such work-product protection was waived through disclosure to E&Y; and (3) whether the district court erred in not considering the IRS's request for E&Y's workpapers.

On these evidentiary issues, we "review district court rulings on questions of law de novo; we review district court fact findings for clear error; and we review 'discretionary judgments such as evidentiary rulings' for abuse of discretion." *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002) (quoting *United States v. Mass. Inst. of Tech.* ("*MIT*"), 129 F.3d 681, 683 (1st Cir. 1997)).

"[T]he party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived." *XYZ Corp. v. United States*, 348 F.3d 16, 22 (1st Cir. 2003).

A. Work-Product Protection

1. Applicable law

"[T]he work-product doctrine does apply in tax summons enforcement proceedings." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981). The work-product doctrine protects "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). In assessing whether a document was prepared in anticipation of litigation, this circuit uses the "because of" test. *Maine*, 298 F.3d at 68. Under this test, a document is protected "if, 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or

obtained because of the prospect of litigation.'" *Id.* at 70 (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)) (emphasis in original). It is also our law that, "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Id.* (quoting *Adlman*, 134 F.3d at 1202). As discussed below, we hold in this case that the presence of a business purpose does not defeat work-product protection.

The work-product doctrine originates in *Hickman v. Taylor*, where the Supreme Court laid out the problems with allowing the discovery of work product:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). The doctrine is rightly seen as a protection for the adversary system, not simply the attorney. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (noting the doctrine does not protect all documents prepared by a lawyer and instead "focuses on the integrity of the adversary trial process itself" (quotation omitted)).

The Restatement has offered a definition of litigation in the work product context:

> "Litigation" includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing. In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues.

Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000). "'Adversarialness' is the touchstone of this approach to the 'litigation' question . . . ." *In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D. Mass. 2004).

2. Are tax disputes "litigation?"

The IRS argues that preparation of tax returns is not meant to be an adversary process, but rather is a self-reporting regime that relies on the good faith of taxpayers. The IRS reasons that it is not seeking to gain unfair litigation advantage but rather to verify self-assessment in an environment where the taxpayer holds all the relevant information. Textron responds that it routinely engages in administrative disputes and even federal court litigation with the IRS.

Citing *Roxworthy*, Textron argues that anticipation of audit disputes can constitute anticipation of litigation. *United States v. Roxworthy*, 457 F.3d 590, 600-01 (6th Cir. 2006) (finding memos prepared analyzing legal ar-

guments supporting and opposing specific tax positions to be protected work product). But, *Roxworthy* cites another case, *Hodges*, for the proposition that "a document prepared 'in anticipation of dealing with the IRS . . . *may* well have been prepared in anticipation of an administrative dispute and this *may* constitute litigation within the meaning of Rule 26.'" *Id.* at 600 (quoting *Hodges, Grant & Kaufmann v. IRS*, 768 F.2d 719, 719-22 (5th Cir. 1985)) (emphasis added). *Hodges*, however, was not expressing a holding, but simply remanding to the district court to consider a work-product claim. Considering that *Roxworthy* dealt with anticipation of litigation with respect to specific transactions, *Roxworthy* does not establish that all documents prepared analyzing tax returns are protected. Instead, *Roxworthy* holds that documents created to analyze specific areas of likely dispute *may* be protected.

Nonetheless, after considering the applicable test, we conclude that, while not all "dealing with the IRS" during an audit is "litigation," the resolution of disputes through adversary administrative processes, including proceedings before the IRS Appeals Board, meets the definition of litigation. The IRS is correct that preparation and filing of returns relies on good faith self-reporting. But, good-faith disputes regarding the proper application of tax law also arise during the audit process. Thus, though the initial processing of these disputes in the audit process may not be adversarial, the disputes themselves are essentially adversarial; the subject of these disputes will become the subject of litigation unless the dispute is resolved.[3]

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[3] Thus, we do not hold that filing tax returns or participating in audits is itself adversarial. Our holding does not and should not

3. Were the tax accrual workpapers prepared in anticipation of litigation?

In addition to the question of whether audit disputes with the IRS are litigation, we must confront the question of whether Textron's tax accrual workpapers are prepared in anticipation of such disputes. The district court reasoned that the business need to cover potential liabilities arose out of the anticipation of potential disputes, and thus would not occur "but for" those disputes. *Textron*, 507 F. Supp. 2d at 150. The IRS argues that the district court's conclusion is factually and legally wrong.

a. Analysis

The IRS argues that, as a legal matter, the documents were not prepared in anticipation of litigation and that the district court misapplied the "because of" test when it reasoned that the documents would not have been created "but for" the prospect of litigation.

We agree with the district court's finding that one of the purposes behind the creation of the documents was anticipation of litigation. As the district court explained, the need to estimate the likelihood of success in litigation was a result of the need to set up a reserve fund to cover tax positions for which Textron could foresee disputes with the IRS.

Of course, simple relation to litigation is insufficient to trigger work-product protection. *Maine*, 298 F.3d at

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change the essentiality of good faith self-assessment. The IRS retains many enforcement tools to ensure compliance with that system. Thus, we do not share in the IRS's negative conclusions about the policy effects of our judgment, which concerns tax accrual workpapers, documents which the IRS admits it seeks only in limited circumstances.

69. Further, work-product protection must be assessed in reference to a "the function that the document serves," not its content. *Roxworthy*, 457 F.3d at 595. And it is not enough that the preparer "had the prospect of litigation in mind when it" created the documents. *Adlman*, 134 F.3d at 1204. Rather, the "because of" test "really turns on whether it would have been prepared irrespective of the expected litigation with the IRS." *Id.*

But, here, the function of the documents was to analyze litigation for the purpose of creating and auditing a reserve fund. It can be fairly said that "'the driving force behind the preparation'" of the documents, *Roxworthy*, 457 F.3d at 595 (quoting *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992)), was the need to reserve money in anticipation of disputes with the IRS. The district court so found, and we find no clear error. *See Cavallaro*, 284 F.3d at 245 (clear error standard applied to findings of fact of district court in privilege case).[4] In this way, we read the

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[4] The dissent challenges this factual conclusion of the district court, but utterly fails to explain why the district court's acceptance of the testimony of Textron's witnesses was clear error. Specifically, the district court found that Textron would have no need to compute reserves if it had not anticipated litigation. *Textron*, 507 F. Supp. 2d at 150 (recognizing that though "it may be accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities," anticipation of disputes drove that very need). Contrary to the dissent's intimations, the district court did find that Textron's tax accrual workpapers were prepared with dual purposes in mind. *Id.* at 143 (finding Textron's "ultimate purpose" in preparing the workpapers was to ensure Textron was adequately reserved with respect to disputes or potential litigation, but acknowledging that the desire to establish adequate reserves "also was prompted, in part, by its wish to satisfy an independent auditor" and obtain a clean opinion). These findings were based on testimony from Textron's witnesses. The testimony of the

district court's "but for" reasoning as a way of expressing its conclusion that the documents would not have been prepared irrespective of the prospect of litigation, but rather were prepared "because of" the risk of disputes and litigation which gave rise to a need to compute and report tax reserves.[5]

The IRS next argues that the district court found that the "workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a 'clean' opinion from E&Y regarding the adequacy of the reserve amount." *Textron*, 507 F. Supp. 2d at 150. The IRS argues that this finding legally compels a ruling that the tax accrual workpapers are not protected, since documents prepared in the ordinary course of business receive no protection. *Maine*, 298 F.3d at 70. The IRS further reasons that since the documents were required to comply with reporting and securities obligations, the tax accrual workpapers were prepared pursuant to "regulatory requirements" and are therefore not protected.

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government's expert, cited by the dissent, does not contradict the conclusion that Textron was motivated by dual purposes, especially considering that it is not clear that the expert is using the same definition of "anticipation of litigation" that we adopt. *See infra*. Thus, the district court's fact finding was not clearly erroneous. Rather, it is accurate to say that Textron's tax accrual workpapers would not have been prepared in a similar form irrespective of the potential for litigation.

[5] The IRS also argues that some form of workpaper would have been prepared even if no disputes were anticipated in order to justify setting aside no reserve. But that is not the context in which the workpapers at issue in this case were created. Rather, the evidence shows that these workpapers project the risks of litigation over specific tax positions and were created in the context of anticipating disputes (and therefore possible litigation) over those positions.

See Nat'l Union, 967 F.2d at 984. The IRS reasons that, as a simple matter of law, Rule 26 does not apply to "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." Fed. R. Civ. P. 26 Notes of Advisory Committee on 1970 amendments.

We reject the IRS's contention that the mere presence of a business or regulatory purpose defeats work-product protection. To be sure, "there is no work-product immunity for documents prepared in the regular course of business *rather than* for purposes of the litigation," even though "litigation is already in prospect." 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2024 (2008) (emphasis added). But, it is also true that "'[d]ual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose." *Id.*; *see also In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (adopting Wright and Miller's "because of" test in order to handle "dual purpose" documents).

Thus, the best reading of the advisory committee's note is simply that preparation for business or for public requirements is preparation for a nonlitigation purpose insufficient in itself to warrant protection. The note states that there is no protection for documents created for business, regulatory, or "other nonlitigation purposes." This language suggests the note is considering business and regulatory purposes as nonlitigation purposes, but does not suggest that the presence of such a purpose should somehow override a litigation purpose, should one exist. To the contrary, the language of the note does not suggest that the advisory committee was considering the

problem of dual purpose documents. Thus, we do not read the note as stating that there should be no protection where a document is prepared because of the possibility of litigation but also for a business or regulatory purpose.[6]

Like in the case where a company analyzes pending litigation for the purpose of setting aside a reserve, *cf. Adlman*, 134 F.3d at 1200 (describing hypothetical examples where work-product protection applies), here the business purpose derives from and is inextricably related to anticipating litigation. That the anticipation of such disputes (and corresponding potential litigation) also

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[6] One district court in this circuit has reached an opposite conclusion. *In re Raytheon Secs. Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003) ("However, even when documents were created 'because of' litigation, documents that are required to be prepared to comply with the law may not be protected."). This approach refuses to protect documents prepared because of the possibility of litigation simply because another possible purpose is present. As explained *infra*, such an approach ignores the primary distinction between the "because of" and the "primary purpose" test.

The IRS also points to another decision in this circuit where the district court analyzed opinion letters regarding investment vehicles alleged to be tax shelters. *Fidelity Intern. Currency Advisor A Fund, L.L.C., ex rel. Tax Matters Partner v. United States*, No. 05-40151, 2008 WL 4809032, at *13 (D. Mass. April 18, 2008). The court found those letters' "purpose was not to analyze pending or imminent claims; instead, it was to induce the taxpayers to invest in the strategy (or, put differently, to provide comfort to those investors, particularly with respect to the possible imposition of future tax penalties)." *Id.* But that court did not hold "dual purpose" documents unprotected. Rather, it essentially made a factual call, which we do not now judge, that the possibility of litigation was too remote. *Id.* As explained, *infra* Section II.A.4, in the present case the context surrounding the creation of the documents, namely the need to estimate reserve funds, made it reasonable for Textron to foresee and analyze litigation.

triggered certain business and accounting obligations does not bar the protection of the work-product doctrine. *See id.* at 1202 ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision."); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61 (7th Cir. 1980) ("We conclude that the materials . . . were indeed prepared in anticipation of litigation, even though they were prepared as well for the filing of the Board of Elections reports."). In arguing against this conclusion, the IRS points to a Third Circuit case where that court instructed the district court on remand to assess whether a tax reserve file was prepared to assist in litigation or to comply with securities requirements. *United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990). In the present case, however, the district court has already conducted such analysis and has concluded that the workpapers were created because of both purposes.

The dissent disagrees with this legal conclusion and relies primarily on the language in *Maine* that "the 'because of' standard does not protect from disclosure 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Maine*, 298 F.3d at 70 (quoting *Adlman*, 134 F.3d at 1202). Based on this language, the dissent charges we are going against established circuit precedent. But, for the reasons described above, it is error to read this "ordinary course of business" language as implying that all documents prepared with some business purpose in mind are necessarily unprotected. The court in *Maine* was not confronted with dual purpose documents like those at issue here. Rather, that court recited the above quoted language in

the course of holding that there was insufficient information to see if the documents at issue were prepared for litigation *or* rather in the ordinary course of business. *Id.* Thus, *Maine's* "ordinary course of business" language should not be read as barring protection for dual purpose documents where one business purpose is present. This conclusion is all the more clear when one consider's *Adlman's* reason for adopting the "because of" test:

> The issue is less clear, however, as to documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation. The formulation applied by some courts in determining whether documents are protected by work-product privilege is whether they are prepared "primarily or exclusively to assist in litigation" — a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision. Others ask whether the documents were prepared "because of" existing or expected litigation — a formulation that would include such documents, despite the fact that their purpose is not to "assist in" litigation. Because we believe that protection of documents of this type is more consistent with both the literal terms and the purposes of the Rule, we adopt the latter formulation.

Adlman, 134 F.3d at 1197-98, *quoted in part in Maine*, 298 F.3d at 68.

Further, a contrary holding would lead to undesirable results in other cases. Consider a document prepared to analyze a specific litigation in order to compute for an auditor how much must be retained in a litigation reserve fund. Were we to adopt the IRS position that documents created to satisfy audit reporting responsibilities were not protected, opposing counsel in the litigation might be able to discover such a memo, effectively disclosing counsel's ultimate mental impression of the case. In fact, in similar circumstances, the Sixth and Second circuits have suggested that memoranda analyzing a transaction or position to be protected by the work-product doctrine. *Roxworthy*, 457 F.3d at 600; *Adlman*, 134 F.3d at 1200-04 (remanding for the district court to apply the correct standard).

b. Countervailing concerns

Having explained why application of the work-product doctrine leads us to the conclusion that Textron's tax accrual workpapers are protected, we pause to address the IRS's arguments against such a conclusion.

i. *Arthur Young*

The IRS asserts our decision will run afoul of Supreme Court precedent. In *Arthur Young*, the Court declined to recognize an accountant's work-product doctrine, thus holding that tax accrual workpapers created by an independent auditor were not protected. *United States v. Arthur Young & Co.*, 465 U.S. 805, 815-21, (1984). The Court recognized that the auditor's papers necessarily included the taxpayer's own thinking about tax "soft spots." *Id.* at 813. The Court also rejected some of the fairness concerns implicated in that case. *Id.* at 820 (rejecting argument that "enforcement of an IRS summons for accountants' tax accrual workpapers per-

mits the Government to probe the thought processes of its taxpayer citizens, thereby giving the IRS an unfair advantage in negotiating and litigating tax controversies"). Further, the Court rejected policy concerns that, without a new privilege, companies would be tempted to withhold information from auditors. *Id.* at 818-19 (finding that "[r]esponsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return" and concluding that "the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers").

Following this precedent, we have recognized that "the doctrine of construing the [attorney-client] privilege narrowly . . . has particular force in the context of IRS investigations given the 'congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry.'" *Cavallaro*, 284 F.3d at 245-46 (quoting *Arthur Young*, 465 U.S. at 816). But unlike the Court in *Arthur Young*, we are not now confronted with the question of whether to recognize a new privilege. Here, the doctrinal decision we face is whether to afford protection to documents created because of both business and litigation — a question not presented in *Arthur Young*.[7] Since this question has broader implications, the

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[7] The IRS also suggests that the Supreme Court was comfortable with discovery of taxpayer tax accrual workpapers because it "affirmatively encouraged the IRS's seeking tax-accrual workpapers from the company prior to pursuing such workpapers from the auditor." IRS Reply Brief at 22-23 (citing *Arthur Young*, 465 U.S. at 820-21 & n.17). But the cited provisions of *Arthur Young* do not consider the question of work-product protection, and do not endorse

Supreme Court's policy judgment that a new privilege is not necessary for the accurate preparation of accountants' tax accrual workpapers is not controlling. Further, our prior analysis of this issue does not rely on the policy considerations rejected in *Arthur Young*. That case is not an obstacle to our conclusion that protection of dual-purpose documents is consistent with the purpose and doctrine of the work-product doctrine.

ii. ***El Paso***

Because of a contrary outcome in a Fifth Circuit case, the IRS argues that our decision will create a circuit split. *See United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982), *cert. denied*, 466 U.S. 94 (1984). In *El Paso*, the Fifth Circuit found that a company's own tax accrual workpapers were not protected as they were created for purposes of complying with securities law:

> In sum, we believe that the tax pool analysis does not contemplate litigation in the sense required to bring it within the work product doctrine. The tax pool analysis concocts theories about the results of possible litigation; such analyses are not designed to prepare a specific case for trial or negotiation. Their sole function, from all that appears in the record, is to back up a figure on a financial balance sheet. Written

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any particular method, but rather simply take note that the IRS "has demonstrated administrative sensitivity" by adopting a policy to "take all reasonable means to secure the information from the corporation itself before issuing a summons to the independent auditor." *Arthur Young*, 465 U.S. at 821 n.17. Whether such "reasonable means" can include summons of a taxpayer's own tax accrual workpapers was not considered by the Supreme Court.

> ultimately to comply with SEC regulations, the tax pool analysis carries much more the aura of daily business than it does of courtroom combat. We hold, therefore, that the tax pool analysis and backup memoranda are not protected work product materials.

Id. at 543-44. However, in *El Paso* the Fifth Circuit applied a different definition of the work-product doctrine, asking whether the "primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Id.* at 542 (internal quotation marks omitted). Thus, the result here does not create a circuit split with *El Paso*, but is merely the application of an existing split in the definition of the "anticipation of litigation." It is precisely in these "dual purpose" situations that the "because of" test used in this circuit distinguishes itself from the "primary purpose" test used in the Fifth Circuit. *Maine*, 298 F.3d at 68 (citing *Adlman* for the proposition that the primary purpose test "is at odds with the text and the policies of Rule 26 because nothing in it suggests that documents prepared for dual purposes of litigation and business or agency decisions do not fall within its scope"). Thus, unlike the Fifth Circuit, we need not assess whether the tax accrual workpapers carry more of one aura than another. We need only conclude that since the analysis was undertaken "because of" the anticipation of litigation, work-product protection applies.

iii. Factual argument

Since some tax positions in the accrual papers carry a 100 percent chance of failing, the IRS argues, as a factual matter, that Textron could not have been anticipating litigation. But, Textron explained that those entries were the result of identifying positions that were incor-

rect as a result of subsequent legal developments. The IRS also argues that most disputes are resolved informally. But the fact that most disputes are resolved before litigation commences does not mean that analysis of those disputes could not have been in anticipation of "the prospect of litigation" over those disputes. To the contrary, assessing the likelihood that a tax position will not withstand scrutiny necessarily entails analysis which anticipates how litigation of that position would be resolved.

4. Has Textron adequately identified the specific litigation for which the workpapers were prepared?

Adlman and *Roxworthy*, cases we relied on above, are also not directly on point as they involved documents analyzing the consequences of a specific litigation or specific transaction. The IRS argues that this distinction is controlling, that to protect Textron's tax accrual workpapers is in effect to afford a "blanket" protection — a work-product doctrine that is so broad it will "swallow" the attorney-client privilege. It is true that we have required proponents of a work-product protection claim to "'identify the litigation for which the document was created . . . and explain why the work-product privilege applies to all portions of the document.'" *Maine*, 298 F.3d at 69 (quoting *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 237 (1st Cir. 1994)). These "identification and explanation requirements are not to be given a hypertechnical construction," but "they can neither be brushed aside nor satisfied by vague generalities." *Id.*

Here, Textron has met its burden. The tax accrual workpapers identify and numerically evaluate a number of tax positions Textron took on its 2001 returns. As de-

scribed above, Textron has shown that its analysis of each position was prepared by anticipating the possibility of litigation with the IRS arising over a dispute regarding that position. Thus, the tax accrual workpapers identify specific positions, and the litigation projections were created in anticipation of disputes and possible litigation over those positions.[8]

The IRS again argues that Textron could not have consistently had specific litigation in mind since most tax disputes were resolved before litigation and since Textron could not reasonably intend to litigate every challenged position. But these facts do not change our analysis. As the district court found, the spreadsheet at issue assessed the likelihood of succeeding in litigation over each specific position. Thus, the function served by creating this analysis is to assess what funds must be set aside in anticipation of litigation over each of the positions identified. That Textron might ultimately decide not to dispute a specific position does not contradict the conclusion that when it estimated its litigation success, it was anticipating specific litigation.

Again, we note that a contrary result would lead to an undesirable result. If we were only to afford work product protection over documents of this sort by requiring a showing, as the IRS suggests, that there was some specific quantum of expectation that the position at issue

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[8] The IRS posits that some entries in the tax accrual workpapers may refer to reserves held for deferred taxes over which no litigation is to be expected. That some reserves may not be based on disputes does not change our conclusion regarding computation of reserves that are based on potential disputes. Further, the IRS has not requested that we order the production of only the papers regarding deferred tax reserves, which in any event, would not appear to be relevant to assisting the IRS.

would mature into full-fledged litigation, we would essentially be offering protection only to the cantankerous and combative taxpayer who intends to thoroughly litigate every position.

Precedent does suggest that a party claiming work-product protection must "'have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.'" *Roxworthy*, 457 F.3d at 594 (quoting *In re Sealed Case*, 146 F.3d 881, 888 (D.C. Cir. 1998)). The district court found that, considering its history, it was reasonable for Textron to conclude that litigation with the IRS was likely. We see the matter differently but reach the same result.

In the context of these facts, we do not think that a history of litigation with the IRS should be the deciding factor. A company with a history of challenging the IRS creates these documents "because of" the same reason as another company without such a history: the possibility of a dispute compels them to anticipate litigation so as to prepare and assess their tax reserve funds. In this case, the anticipation of litigation coupled with securities and reporting requirements forced Textron to analyze and project its likelihood of success in litigation. Thus, Textron was effectively forced to operate under the hypothetical belief that litigation would occur. For this reason, regardless of its specific history with the IRS, it was objectively reasonable for Textron to forecast litigation.

The IRS argues that this holding will "immunize nearly every document generated by lawyers because clients can always be said to be aware of possible litigation." The IRS worries that work-product protection would "encompass essentially all legal advice," since any lawyer analyzing the risks inherent in a legal transaction or position will be able to gain work-product protection

by saying that the analysis was prepared in anticipation of litigation regarding that transaction or position. We disagree. As we have just explained, in the case of tax accrual workpapers, the dual purposes — financial reporting and anticipating litigation — are necessarily intertwined; the function of preparing adequate financial reports inherently requires Textron to anticipate and analyze litigation. The anticipation of litigation may be similarly intertwined in other cases. *See, e.g., Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (distinguishing case law requiring a "specific claim" to uphold a claim of work-product protection to certain IRS memoranda analyzing potential legal vulnerabilities). But in many cases, there will not be an obvious objectively reasonable need to foresee litigation.[9] Of course, each case will depend on its facts. *See,*

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[9] For example, the IRS argues that protecting Textron's tax accrual papers would lead to protection of documents prepared by a bank to estimate loan failure rates. We disagree. A loan may fail for all sorts of reasons. Tax positions would ultimately succeed or fall based on their legal merit, assessed through litigation. In this case, the combination of the possibility of litigation and reporting requirements required Textron to anticipate litigation. Legal analysis of other transactions and positions may not entail such specific consideration of litigation.

The IRS also fears our holding will somehow lead companies to use lawyers to conduct performance reviews, then seek work-product protection for such documents. We think such a hypothetical is distinguishable. In such a case, the employer may be evaluating the employee's performance for business purposes, regardless of the possibility of litigation. Here, Textron evaluates its tax positions for business purposes precisely because of the possibility those positions will be challenged in litigation. Thus, the business context makes it reasonable for Textron to anticipate and foresee litigation. While such a question is a factual matter for another case, it seems less likely that the function of employee evaluations would similarly make it reasonable for an employer to anticipate litigation.

e.g., *Adlman*, 134 F.3d at 1204 (remanding for further fact finding applying the correct standard). But, in the present case, we conclude that Textron's need to consider the possibility of litigation with respect to each disputed position adequately satisfies this requirement.

B. Waiver of Work-Product Protection

Unlike attorney-client privilege, "work product protection is provided against 'adversaries,' so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection." *MIT*, 129 F.3d at 687. Specifically, "disclosure to an adversary, real or potential, forfeits work product protection." *Id.*

We must decide whether Textron waived work-product protection by showing its tax accrual workpapers to E&Y, its independent auditor. A number of district court cases have concluded that disclosure to independent auditors does not waive work-product protection. *See, e.g.*, *Regions Fin. Corp. & Subsidiaries v. United States*, No. 06-00895, 2008 U.S. Dist. LEXIS 41940, at *27-28 (N.D. Ala. May 8, 2008); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) ("Disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information."); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D.N.Y. 2004) ("A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud."). *But see Medinol v. Boston Sci. Corp.*, 214 F.R.D. 113, 116-17 (S.D.N.Y. 2002) ("Boston Scientific and its outside auditor Ernst & Young did not share 'common interests' in litigation, and disclosures to Ernst & Young as independent auditors did not therefore serve the privacy interests that the work product doctrine was intended to pro-

tect."). It is undisputed that Textron and E&Y were not actual adversaries. The IRS argues by analogy to *MIT* that they were potential adversaries. In *MIT*, we found work-product privilege waived when MIT disclosed documents to a Defense Department auditing agency. 129 F.3d at 687. The audit agency was reviewing MIT's expense submissions. *Id.* We found MIT and the agency to be potential adversaries as, "MIT doubtless hoped that there would be no actual controversy between it and the Department of Defense, but the potential for dispute and even litigation was certainly there." *Id.*

The facts here are different. While the Defense Department auditing agency was reviewing expenses to determine if it would challenge those expenses, E&Y was not auditing Textron in order to identify disputes it would have with Textron, but rather, to decide if it could issue a letter certifying Textron's financial statements. This is a cooperative not adversarial relationship. *See Jaffe Pension Plan*, 237 F.R.D. at 183 ("[T]he fact that an independent auditor must remain independent from the company it audits does not establish that the auditor also has an adversarial relationship with the client as contemplated by the work product doctrine."). While it is possible to imagine circumstances where E&Y's professional obligations could cause E&Y and Textron to come into conflict on some legal question, the IRS can point to no "conceivable scenario in which E&Y would file a lawsuit against [Textron] because of something E&Y learned from [Textron's] disclosures." *Regions*, 2008 U.S. Dist. LEXIS 41940, at *27-28 (citing *MIT* and the district court's opinion in this case to conclude that there was no waiver in similar circumstances). Whereas MIT's disclosure to the Defense Department auditing agency had the potential to directly trigger a dispute with that agency, no such potential adversity existed here.

Disclosure to a conduit to a potential adversary can also waive work-product protection. *Raytheon*, 218 F.R.D. at 360 (collecting cases). In other words, waiver occurs upon disclosure to a third party that "substantially increased the opportunities for potential adversaries to obtain the information." 8 Wright, Miller, & Marcus, *supra*, § 2024 (2008). Though E&Y has professional confidentiality obligations limiting disclosure, the IRS argues that it may be required to turn documents over to the SEC and may, in some circumstances, have a duty to disclose information to protect stockholders. *See Arthur Young*, 465 U.S. at 817-18 ("The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.").

The IRS also argues that E&Y may be required to disclose this information in response to a valid subpoena. At first glance, this argument seems circular: a subpoena would only be valid if the protection did not survive. But, on further examination, the question is more complicated. The record establishes that E&Y did not retain a copy of Textron's tax accrual workpapers. Thus, at first we would see little likelihood that E&Y would have to disclose those papers. But, E&Y used those papers, together with its own expertise, in preparing its own assessment of Textron's reserve tax liability. Therefore, the only remaining documents which could be subjected to a risk of discovery are E&Y's own assessments, which incorporate Textron's analysis.

Though we hold Textron's tax accrual workpapers are protected, *Arthur Young* suggests that E&Y's work-

papers may be discoverable. 465 U.S. at 815-821.[10] In fact, as we find *infra*, Textron itself may be required to produce E&Y's workpapers on remand.

Since E&Y's workpapers may be discoverable, the question we must ask is whether disclosure of those workpapers substantially increased the risk that the contents of Textron's workpapers would be disclosed to an adversary. As the Supreme Court has recognized, independent auditors "obtain and assess the opinions, speculations, and projections of management with regard to unclear, aggressive, or questionable tax positions that may have been taken on prior tax returns." *Arthur Young*, 465 U.S. at 812. Further the auditor's workpapers "*may* document the auditor's interviews with corporate personnel." *Id.* (emphasis added). Thus, disclosure of E&Y's workpapers *might* reveal Textron's own analysis. On the other hand, E&Y's affiant, Weston, suggested that E&Y "did not rely solely upon the conclusions of [Textron's] tax counsel" but instead "applied its own professional knowledge and judgment." Because the district court did not address the question of whether the IRS can gain discovery of E&Y's tax workpapers through a subpoena to Textron, it made no factual findings regarding the actual contents of E&Y's workpapers or the extent to which disclosure of such workpapers would effectively constitute disclosure of Textron's own assessment. Rather than rely on vague language suggesting what might be in E&Y's workpapers, we think that this is a question the district court must develop on remand

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[10] Though the parties debate the extent of confidentiality agreements and expectations of privacy between Textron and E&Y, we find such expectations irrelevant here, since a bilateral confidentiality agreement regarding Textron's workpapers would not defeat a valid IRS subpoena for E&Y's workpapers.

through *in camera* inspection, if feasible, or through testimony.

C. E&Y's Workpapers

The IRS's subpoena also sought tax accrual workpapers prepared by E&Y that were within the possession, custody, or control of Textron or its accountants. The district court did not include such workpapers in its definition of the documents sought and so did not rule on their discoverability. The IRS asserts that such failure to rule is error.

Textron argues that this omission is the fault of the IRS. When convening the evidentiary hearing, the district court called on the parties to present evidence on the question of "[w]hat specific types of documents are included in the 'Tax Accrual Workpapers' and 'backup' documentation" sought by the summons. But the evidence at the evidentiary hearing simply concerned Textron's workpapers, and the IRS did not bring up E&Y's workpapers. Textron thus argues that the IRS should not be permitted to now challenge the scope of the district court's construction of the summons. We disagree.

The summons explicitly sought these documents and the record indicates that the government reiterated its request in its briefing and at the initial oral arguments held before the evidentiary hearing was scheduled. The district court was fairly put on notice of this request, and in fact, when discussing the applicability of I.R.C. § 7525, stated at the oral arguments, "I think you've made your case as far as the Ernst & Young papers." That the evidentiary hearing focused on developing evidence regarding the nature of Textron's tax accrual workpapers does not show that the IRS had abandoned its clearly made request for E&Y's workpapers. In other words, since the

IRS "squarely and distinctly" requested E&Y's workpapers, and the district court was on notice of the issue, the argument is not waived. *Cf. B&T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) ("To preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court — and a veiled reference to a legal theory is not enough to satisfy this requirement.").

Turning to the merits, as noted above, *Arthur Young* suggests such documents are not protected and Textron has not argued otherwise. Textron also does not meaningfully dispute the government's prima facie showing of relevance. Instead, Textron contends that we may nevertheless affirm the district court because Textron, the only defendant in this action, does not have possession, custody, or control of these documents.

In the normal discovery context, "so long as the party has the legal right or ability to obtain the documents from another source upon demand, that party is deemed to have control." *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004); *see also* 8A Wright, Miller, & Marcus, *supra*, § 2210 ("Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact it has no copy."). Textron has provided us with no argument why that test should not apply in the IRS subpoena context.

Textron argues that its witness testified that Textron could not access the documents. But Textron mischaracterizes the record. Textron's witness simply testified that E&Y did not give Textron its workpapers, not that Textron could not obtain copies of the documents upon request. Thus Textron has no evidence showing that it did not have the ability to demand the documents. Textron

argues that R.I. Gen. Laws § 5-3.1-22 establishes an independent auditor owns its own workpapers. But, again, it does not establish that Textron does not have the ability or contractual right to request the documents.

The IRS has some evidence to suggest that Textron may have had the right to demand E&Y's workpapers. Raymond, a Textron witness, stated that she had reviewed E&Y's files to confirm that E&Y did not retain Textron's workpapers. The IRS argues that this shows Textron has the right to obtain the documents. Textron argues it shows only a right to temporary access. We need not parse this testimony, since even adopting Textron's interpretation, we could not affirm on this basis. Textron has the burden of showing a lack of control and has produced no evidence to meet this burden. *United States v. Lawn Builders of New England*, 856 F.2d 388, 392 (1st Cir. 1988) ("'Once the district court has reason to believe that the requested documents exist, the burden then shifts to the summonee to show that he is not in possession of them.'" (quoting *United States v. Freedom Church*, 613 F.2d 316, 322 (1st Cir. 1979))). Thus, we remand for the district court to determine the factual question of whether Textron can obtain E&Y's workpapers.

III. Conclusion

For the foregoing reasons, we affirm the district court's determination that Textron's tax accrual workpapers are protected, affirm that Textron and E&Y were not potential adversaries, but vacate the ultimate determination that work-product protection was not waived, and remand for the district court to reassess, in a manner consistent with this opinion, the question of whether disclosure of E&Y's workpapers would reveal the information contained in Textron's own workpapers. On remand the district court should also assess the discovera-

bility of E&Y's workpapers by determining whether Textron has the legal right or ability to obtain these documents.

Affirmed in part, Vacated in part, and Remanded. No Costs are imposed.

BOUDIN, Circuit Judge, concurring in part and dissenting in part.

The central issue is whether Textron's tax-accrual work papers are protected from IRS summons because they are attorney work product. Any lawyer might be unnerved to find that his potential adversary could obtain the lawyer's own estimate of his chances of success. But under our own precedent and consistent with other circuits, tax-accrual work papers are not protected because they are prepared for reasons independent of the need to prepare for or conduct litigation.

Federal securities laws require publicly traded corporations like Textron to have their financial statements certified by an independent auditor. *See* 15 U.S.C. §§ 78l, 78m; 17 C.F.R. § 210 *et seq.* Key to the audit is evaluating "the adequacy and reasonableness of the corporation's reserve account for contingent tax liabilities." *United States v. Arthur Young & Co.*, 465 U.S. 805, 812 (1983). Tax accrual work papers aid by *inter alia*

> pinpoint[ing] the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes" [and also include] "an item-by-item analysis of the corporation's potential exposure to additional liability.

Id. at 813.

In the wake of Enron and other corporate scandals, the IRS began to seek taxpayers' tax-accrual work papers for certain transactions "that [are] the same as or substantially similar to one of the types of transactions that the [IRS] . . . has determined to be a tax avoidance transaction." Treas. Reg. § 1.6011-4(b)(2) (2002) (codified at 26 C.F.R. § 1.6011-4(b)(2)). Here, the IRS' request for Textron's tax accrual work papers was made after an IRS team found that Textron had entered into nine separate "Sale-In, Lease-Out" ("SILO") transactions.[11]

A qualified privilege exists for attorney work product, but the phrase does not mean any and all work by an attorney that happens to refer to litigation; it means work connected to preparing for or managing litigation. *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). The attorney-client privilege is not in any way confined to advice given for use in litigation, *Mead Data Central, Inc. v. U.S. Dep't. of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977), but the latter privilege was held to be waived by Textron and is not at issue on this appeal.

In our circuit and in others, documents are said to be created "in anticipation of litigation," and thus eligible for work product protection if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation."

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[11] SILO transactions are "a combination of a sale of an asset by a tax-exempt entity" followed by a "lease back to the same entity." Shvedov, *Tax Implications of SILOs, QTEs, and Other Leasing Transactions with Tax-Exempt Entities* 1, CRS Report for Congress (Nov. 30, 2004). These transactions benefit private entities by allowing them to "deduct depreciation" and "interest." *Id.* at 10.

Maine v. U.S. Dep't. of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)) (internal quotation marks omitted). The "because of" phrase, standing alone, does not answer the question what happens if the document is created to satisfy some requirement imposed *independently* of the need to litigate, but our precedent squarely answers the question.

We have held that work-product protection does not extend to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Maine*, 298 F.3d at 70 (*quoting Adlman*, 134 F.3d at 1202) (internal quotation marks omitted). This caveat applies "even though litigation is already in prospect," *Adlman*, 134 F.3d at 1202 (citing 8 Wright, Miller & Cooper, *Federal Practice and Procedure* § 2024, at 346 (3d ed. 1998)), and even if "the documents aid in the preparation of litigation." *Maine*, 298 F.3d at 70.

The district court held that the work papers "would not have been prepared 'but for' the fact that Textron anticipated the possibility of litigation with the IRS" and that if "Textron had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the work papers used to calculate the reserve." *U.S. v. Textron Inc.*, 507 F. Supp. 2d 138, 150 (D.R.I. 2007). But this misreads *Maine*: *Maine* holds that it is not the subject matter discussed in the materials that controls but whether documents are prepared "in the ordinary course of business" or were otherwise independently required, which are both the case with tax accrual work papers mandated by accounting requirements.

The decisions in other circuits bear out this legal interpretation. In *Adlman* itself, the company in question had "the prospect of litigation [with the IRS] in mind" when it asked for the preparation of a memorandum studying the tax implications of a contemplated restructuring; nonetheless, the Second Circuit allowed that if the memorandum would have been prepared in a similar form without expected litigation with the IRS, then it was not created "because of" litigation. *Adlman*, 134 F.3d at 1203-04; *accord United States v. Roxworthy*, 457 F.3d 590, 598-99 (6th Cir. 2006).[12]

Conversely, in cases finding documents to be protected, it is because the documents were created in order to be useful in litigation. *See, e.g., Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (protection for "attorneys' assessment of . . . legal vulnerabilities in order to make sure it does not *miss anything in crafting its legal case*") (emphasis added); *see also In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998) (protection for documents to "protect the client from future litigation about a particular transaction").

To the extent the panel majority rests on the district court's legal interpretation, that interpretation is simply at odds with our decision in *Maine* and with *Adlman* on which *Maine* relied. Nor can the district court's outcome

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[12] *See also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433, 435 (D. Md. 2005) (no protection for notes and memoranda detailing witness interviews where "principal reason" for documents was "to satisfy the requirement of . . . outside accountants"); *Fidelity Int'l Currency Advisor A Fund, LLC v. United States*, No. 05-40151-FDS, 2008 WL 4809032, at *12-14 (D. Mass. Apr. 18, 2008) (no protection for opinion letters analyzing "likely tax consequences" of certain transactions where purpose was "to induce the taxpayers to invest in the strategy").

be defended by treating the district court's decision as a *factual* finding that *in this instance* Textron prepared these documents *both* to satisfy the accounting requirements and for possible use in litigation. This is not what the district court found and, given the legal rule adopted in *Maine* and *Adlman*, it would not matter if it had so found.

The government offered compelling evidence that the sole reason for the creation of Textron's estimates of risk with respect to individual tax positions was to prepare the reserve figures for the company books and statements and to satisfy the auditors that the reserves were adequate. No contrary evidence was offered by Textron. The district court made no contrary finding and any such finding would have been clearly erroneous. The government's expert witness—the former chief auditor of the Public Company Accounting Oversight Board—testified:

> Q: Does a public company prepare tax accrual work papers only when it anticipates litigation over the issues identified in the work papers?
>
> A: No. They have to prepare them to support the representations in the financial statements.
>
> Q: So if a public company believes the chances of litigation over the issues in the work papers are remote, it would still prepare those work papers?
>
> A: Yes. because they'd have to be able to support that judgment [to the independent auditor].
>
> Q: And would those work papers be prepared in the same form as work papers in-

> volving issues for which the company actually anticipates litigation?
>
> A: Certainly, the basics would be the same. . . .
>
> . . .
>
> Q: Would the tax accrual work papers ever be blank?
>
> A: I can't think of a circumstance where they would, no.

Textron's own witness acknowledged that it would "have to include in its . . . tax accrual work papers any new transactions that the company entered into that year that there might be some tax exposure on" regardless of whether it anticipated litigation with the IRS. Textron offered no testimony purporting to show that its lawyers had any intention of utilizing its assessment in the conduct of any litigation that might ensue (although it did offer speculation as to how such documents *might* conceivably be helpful), and such a use is not even arguably the driving purpose behind the document's creation.

The only circuit precedent that directly involves tax accrual work papers held that they were not protected attorney work product. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982) (noting that in tax accrual work papers legal analysis is only a "means to a business end").[13] The Fifth Circuit looked to the primary purpose

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[13] *El Paso* denied protection for the work papers because the court recognized that the company in question was conducting the relevant analysis because of a need to "bring its financial books into conformity with generally accepted auditing principles." *Id.* at 543. And, it saw the need to satisfy independent auditors as being "compelled by the securities laws." *Id.*

of the documents in deciding whether they were created "in anticipation of litigation"; but the "because of" test, as construed in *Maine*, is certainly no more protective here because it denies protection so long as the papers would have been prepared regardless of litigation.

The government's position is also supported by two scholarly articles that analyzed, and roundly condemned, the lower court's decision. Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 Hous. Bus. & Tax L.J. 337 (2008); Ventry, *Protecting Abusive Tax Avoidance*, 120 Tax Notes 857 (2008). Without endorsing everything in the articles, it is fair to say that they make scholarly mince-meat of Textron's position.

In most matters of privilege, there is a certain arbitrariness as to where to draw the line or, to put it differently, even the most sacrosanct of privileges represents a sacrifice of other interests—usually, as Bentham classically explained, the interest of truth. 8 Wigmore, *Evidence* § 2291 (McNaughton Rev. 1961). Here, the matter is not open to a panel for re-examination on policy grounds, but no one should think that the policy arguments are all on one side.

Precisely because the work papers in this instance are required by the financial statement obligations and accounting rules, there is little risk of the chilling effect so often paraded in privilege cases. The Supreme Court in rejecting an accountant's privilege for the preparation of tax accrual work papers pointed out that large companies effectively have to comply with the accounting requirements and would do so with or without a privilege for the accountant. *Arthur Young*, 465 U.S. at 818-19.

And, while it may seem one-sided to give the government Textron's blue print to weaknesses in Textron's tax returns, the return is massive—constituting more than 4000 pages; the government has an important interest in collecting taxes that are owed; and its inquiries into work papers were focused on a specific type of transaction that had been shown to be open to abuse. So context should be kept in mind before shedding too many tears for Textron.

In all events, it is important for us to adhere to the existing rules of the road. Parties can generally adjust their behavior so long as they know what privilege rules apply. Here, the governing rubric in *Maine* (First Circuit) and *Adlman* (Second Circuit) and a precise precedent in *El Paso* (Fifth Circuit) govern this case. An *en banc* court could change the rule; a panel majority cannot.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 06-198T

UNITED STATES OF AMERICA, Petitioner,

v.

TEXTRON INC. AND SUBSIDIARIES, Respondent.

Aug. 28, 2007

TORRES, Senior District Judge.

Pursuant to 26 U.S.C. §§ 7402(b) and 7604, the United States has filed a petition to enforce an Internal Revenue Service (IRS) summons served on Textron Inc. and its subsidiaries ("Textron") in connection with the IRS's examination of Textron's tax liability for tax years 1998-2001. The summons seeks Textron's "tax accrual workpapers" for its 2001 tax year. Textron has refused to produce the requested documents on the grounds that (1) the summons was not issued for a legitimate purpose and (2) the tax accrual workpapers are privileged.

Because this Court finds that the requested documents are protected by the work product privilege, the petition for enforcement is denied.

Facts

Based on the pleadings, affidavits submitted by the parties, and the evidence presented at a hearing conducted on June 26, 2007, this Court finds the relevant facts to be as follows.

Textron, Inc. is a publicly traded conglomerate with approximately 190 subsidiaries. One of its subsidiaries is Textron Financial Corporation (TFC), a company that provides commercial lending and financial services. In 2001 and 2002, Textron had six tax attorneys and a number of CPAs in its tax department but TFC's tax department consisted only of CPAs. Consequently, TFC relied on attorneys in Textron's tax department, private law firms, and outside accounting firms for additional assistance and advice regarding tax matters.

Like other large corporations, Textron's federal tax returns are audited periodically at which time the IRS examines the returns for the tax years that are part of the audit cycle. In conducting its audits, the IRS, typically, gathers relevant information by issuing "information document requests" (IDRs) to the taxpayer. If the IRS disagrees with a position taken by the taxpayer on its return, the IRS issues a Notice of Proposed Adjustments to the taxpayer. A taxpayer that disputes the proposed adjustments has several options to resolve the dispute within the agency. Those options range from an informal conference with the IRS team manager to a formal appeal to the IRS Appeals Board. If the dispute is not resolved within the agency, the taxpayer may file suit in

federal court. In seven of its past eight audit cycles covering the period between 1980 and the present, Textron appealed disputed matters to the IRS Appeals Board; and three of these disputes resulted in litigation.[1]

During the 1998-2001 audit cycle, the IRS learned, from examining Textron's 2001 return, that TFC had engaged in nine "sale-in, lease-out" (SILO) transactions involving telecommunications equipment and rail equipment. The IRS has classified such transactions as "listed transactions" because it considers them to be of a type engaged in for the purpose of tax avoidance. *See* 26 C.F.R. § 1.6011-4(b)(2). The IRS issued more than 500 IDRs in connection with the 1998-2001 audit cycle, and Textron complied with all of them, except for the ones seeking its "tax accrual workpapers."

The Summons

On June 2, 2005, Revenue Agent Vasconcellos, the manager of the IRS team examining Textron's return, issued an administrative summons for "all of the Tax Accrual Workpapers" for Textron's tax year ending on December 29, 2001. The summons defined the "Tax Accrual Workpapers" to include:

> [A]ll accrual and other financial workpapers or documents created or assembled by the Taxpayer, an accountant for the Taxpayer, or the Taxpayer's independent auditor relating to any tax reserve for cur-

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[1] *See Textron, Inc. v. Comm'r*, 117 T.C. 67 (2001) (relating to federal income tax liability for tax years 1987 through 1992); *Textron, Inc. v. Comm'r*, 336 F.3d 26 (1st Cir. 2003) (appeal regarding a different issue raised in the tax court); *Textron, Inc. v. United States*, 418 F. Supp. 39 (D.R.I. 1976) (relating to tax years 1959 through 1962).

> rent, deferred, and potential or contingent tax liabilities, however classified or reported on audited financial statements, and to any footnotes disclosing reserves or contingent liabilities on audited financial statements. They include, but are not limited to, any and all analyses, computations, opinions, notes, summaries, discussions, and other documents relating to such reserves and any footnotes. . . .

Textron refused to produce its tax accrual workpapers, asserting that they are privileged and that the summons was issued for an improper purpose.

The Tax Accrual Workpapers

Because there is no immutable definition of the term "tax accrual workpapers," the documents that make up a corporation's "tax accrual workpapers" may vary from case to case.[2] In this case, the evidence shows that Textron's "tax accrual workpapers" for the years in question consist, entirely, of:

1. A spreadsheet that contains:

   (a) lists of items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and, therefore, may be challenged by the IRS;

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[2] Professor Douglas Carmichael, the government's expert, explained that the content of tax accrual workpaper files "does vary" because "Companies organize their records in different ways." Transcript of June 26, 2007 Evidentiary Hearing at 132. *See also United States v. El Paso Co.*, 682 F.2d 530, 533 (5th Cir. 1982) (noting the many names for tax accrual workpapers).

(b) estimates by Textron's counsel expressing, in percentage terms, their judgments regarding Textron's chances of prevailing in any litigation over those issues (the "hazards of litigation percentages"); and

(c) the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation (the "tax reserve amounts").

2. Backup workpapers consisting of the previous year's spreadsheet and earlier drafts of the spreadsheet together with notes and memoranda written by Textron's in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of litigation percentage that should apply to each item.

The evidence shows that while Textron may possess documents, such as leases, that contain factual information regarding the SILO transactions and other items that may be listed on the spreadsheet, its tax accrual workpaper files do not include any such documents.

As stated by Norman Richter, Vice President of Taxes at Textron and Roxanne Cassidy, Director, Tax Reporting at Textron, Textron's ultimate purpose in preparing the tax accrual workpapers was to ensure that Textron was "adequately reserved with respect to any potential disputes or litigation that would happen in the future." It seems reasonable to infer that Textron's desire to establish adequate reserves also was prompted, in part, by its wish to satisfy an independent auditor that Textron's reserve for contingent liabilities satisfied the requirements of generally accepted accounting principles (GAAP) so that a "clean" opinion would be given

with respect to the financial statements filed by Textron with the SEC.

Each year, Textron's tax accrual workpapers are prepared shortly after the corporation's tax return is filed. The first step in preparing the workpapers is that Textron's accountants circulate to Textron's attorneys a copy of the previous year's tax accrual workpapers together with recommendations regarding their proposed changes and/or additions for the current year. Textron's attorneys, then, review those materials, propose further changes to the spreadsheets and hazard litigation percentages which are returned to the accountants who compile the information and perform the mathematical calculations necessary to compute the tax reserve amounts. The attorneys and accountants, then, meet to give their approval so that the accountants may finalize the workpapers.

TFC goes through a similar process in preparing its tax accrual workpapers but, since TFC does not have any in-house attorneys, its accountants rely on tax advice obtained from outside accounting and law firms, before meeting with a Textron tax attorney to finalize the workpapers.

Once the tax reserve amounts for each item on the worksheets are established, those amounts are aggregated with other contingent liabilities and the total is reported as "other liabilities" on Textron's financial statements.

During the course of an audit conducted by Ernst & Young (E&Y), Textron's independent auditor, Textron permitted E&Y to examine the final tax accrual workpapers at issue in this case with the understanding that the information was to be treated as confidential.

Analysis

I. *The Summons*

A. *Scope and Enforceability, in General*

Section 7602 authorizes the IRS to issue administrative summonses for the production of "any books, papers, records, or other data which may be relevant or material" in "ascertaining the correctness of any return, . . . , determining the liability of any person for any internal revenue tax . . ., or collecting any such liability. . . ." 26 U.S.C. § 7602(a). The Supreme Court has described § 7602 as a "broad summons authority" reflecting a "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502, 79 L. Ed. 2d 826 (1984).

When documents requested in a summons are not produced, the United States may petition a federal district court for an order compelling compliance. 26 U.S.C. § 7604. To obtain such an order, the IRS must show: (1) that there is a legitimate purpose for the investigation pursuant to which the summons is being sought, (2) that the inquiry or the materials sought may be relevant to that purpose, (3) that the information sought is not already within the Commissioner's possession, and (4) that the administrative steps required by the Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 255, 13 L. Ed. 2d 112 (1964).

The government may make a prima facie showing that those requirements have been satisfied "on the face of the summons and by supporting affidavits." *United States v. Freedom Church*, 613 F.2d 316, 321 (1st Cir. 1979). *See also United States v. Lawn Builders of New*

England, Inc., 856 F.2d 388, 392 (1st Cir. 1988) ("Assertions by affidavit of the investigating agent that the requirements are satisfied are sufficient to make the prima facie case.") (quoting *Liberty Financial Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985)). When the requisite showing has been made, the burden shifts to the party summoned to present evidence that the *Powell* requirements have not been satisfied or that there is some other reason why the summons should not be enforced. *Freedom Church*, 613 F.2d at 319 (citing, *inter alia*, *United States v. LaSalle Nat. Bank*, 437 U.S. 298, 316, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978)).

In this case, Textron does not dispute that the documents sought may be relevant[3] or that the IRS has followed the necessary administrative steps in issuing the summons. Rather, Textron argues that the IRS seeks the documents for the purpose of using them as leverage in settlement negotiations and that the documents are privileged.

B. *The Legitimate Purpose Requirement*

Whether the purpose for issuing a summons is legitimate depends on the circumstances. Section 7602(a) makes it clear that "ascertaining the correctness of any return" and "determining the liability of any person for any internal revenue tax" are legitimate purposes for is-

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[3] In *United States v. Arthur Young & Co.*, 465 U.S. 805, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984), the Supreme Court held that an IRS summons satisfies the *relevance* prong of the *Powell* test if the documents sought "'might have thrown light upon' the correctness of [the taxpayer's] return," *Arthur Young*, 465 U.S. at 813-14 and that the "tax accrual workpapers" involved in that case, which were prepared by the taxpayer's outside auditor, satisfied that relevance standard. 465 U.S. at 815.

suing a summons. On the other hand, it is improper to "us[e] a civil summons to gather evidence to be used solely in a criminal prosecution," *United States v. Kis*, 658 F.2d 526, 535 (7th Cir. 1981), or to issue a summons "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58.

In this case, the statements on the face of the summons, itself, and the supporting declaration of Agent Vasconcellos that the purpose of the summons is to "ascertain the correctness of the tax returns filed by the taxpayer" for the years in question, constitute a *prima facie* showing that the purpose is legitimate. Consequently, the burden is on Textron to "create a 'substantial question in the court's mind regarding the validity of the government's purpose.'" *United States v. Gertner*, 65 F.3d 963, 967 (1st Cir. 1995) (quoting *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970)). In order to carry its burden, Textron "must articulate specific allegations of bad faith and, if necessary, produce reasonably particularized evidence in support of those allegations." *Id.*

In arguing that the government's stated purpose is pretextual and that the IRS's real objective is to use the opinions of Textron's counsel and tax advisers with respect to the SILO transactions as a bargaining lever, Textron alleges that the 2001 examination was substantially completed when the summons was issued; that Textron already had provided numerous documents requested by the IRS regarding the SILO transactions; and that the IRS could have requested any additional documents regarding the facts underlying those transac-

tions. However, those allegations are insufficient to establish a bad faith purpose.

As a factual matter, the IRS disputes the assertion that the 2001 examination had been substantially completed when the summons was issued and the only evidence offered by Textron on this point was an IRS agenda for a March 22, 2005 meeting between the parties which stated, simply, that the purpose of the meeting was to determine what steps were needed to bring the examination to completion. Nor does Textron's production of other documents relating to the SILO transactions or the fact that the IRS could have requested additional documents by issuing IDRs raise a substantial question as to bad faith. The IRS has discretion to determine the manner in which its investigation should be conducted. *See United States v. Norwest Corp.*, 116 F.3d 1227, 1233 (8th Cir. 1997) ("[I]t is for the agency, and not the taxpayer, to determine the course and conduct of an audit"). Accordingly, the IRS is not required to obtain relevant documents by the least formal means possible. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 323, 105 S. Ct. 725, 732, 83 L. Ed. 2d 678 (1985) (the IRS is not required to "conduct its investigations in the least intrusive way possible.").

Textron also argues that the summons is overbroad because it seeks not only TFC's tax accrual workpapers but, also, the tax accrual workpapers for Textron and all of its subsidiaries. However, the request for Textron's workpapers does not establish bad faith because TFC is a subsidiary of Textron and the IRS asserts that it is seeking to determine Textron's overall tax liability, not just any tax due from the SILO transactions.

In short, the IRS has made a prima facie showing that the *Powell* requirements have been satisfied and Textron has failed to rebut that showing.

II. *Applicability of Privilege*

Satisfaction of the *Powell* requirements is not sufficient to warrant enforcement of an IRS summons if the documents sought are privileged. *Upjohn Co. v. United States*, 449 U.S. 383, 386, 101 S. Ct. 677, 681, 66 L. Ed. 2d 584 (1981) (refusing to enforce IRS summons because documents sought contained communications protected by the attorney-client privilege and also recognizing that "the work-product doctrine does apply in tax summons enforcement proceedings."). In general, when a claim of privilege is made, the party asserting the privilege "has the burden of establishing not only the existence of that privilege, but also that the privilege was not waived." *In re Raytheon Sec. Litig.*, 218 F.R.D. 354, 357 (D. Mass. 2003).

In this case, Textron argues that its tax accrual workpapers are protected by the attorney-client privilege, the tax practitioner-client privilege created by 26 U.S.C. § 7525, and the work product privilege.

A. *Attorney-Client Privilege*

The attorney-client privilege protects confidential communications between an attorney and client relating to legal advice sought from the attorney. *See United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002). Since the privilege may hamper the search for truth by preventing the disclosure of relevant evidence, it is narrowly construed. *In re Keeper of Records (XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003) ("the attorney-client privilege must be narrowly construed because it

comes with substantial costs and stands as an obstacle of sorts to the search for truth."). Narrow construction of the privilege is especially called for in the case of tax investigations because of "the congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry.'" *Cavallaro*, 284 F.3d at 245 (quoting *Arthur Young*, 465 U.S. at 816).

Textron's affidavits state that its tax accrual workpapers are privileged because they were prepared by counsel and reflect counsel's legal conclusions in identifying items on Textron's return that may be challenged and assessing Textron's prospects of prevailing in any ensuing litigation. (Richter Aff. ¶¶ 13, 22.) The IRS argues that the workpapers are not privileged because, in preparing them, Textron's attorneys were not providing legal advice but, rather, were performing an accounting function by reconciling the company's tax records and financial statements.

It is true that, generally, the mere preparation of a tax return is viewed as accounting work and a taxpayer may not cloak the documents generated in that process with a privilege simply "by hiring a lawyer to do the work that an accountant, or other tax preparer, or the taxpayer himself . . . normally would do." *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999). *See* E.S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 246 (4th ed. 2001). On the other hand, it is equally true that communications containing legal advice provided by an attorney may be privileged even though they are made in connection with the preparation of a return.

> Determining the tax consequences of a particular transaction is rooted entirely in the law. . . . [Therefore] [c]ommunications

> offering tax advice or discussing tax planning . . . are 'legal' communications.

U.S. v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). *See* Epstein, at 249; Louis F. Lobenhoffer, *The New Tax Practitioner Privilege: Limited Privilege and Significant Disruption*, 26 Ohio N.U. L. Rev. 243, 252 (2000) (the attorney-client privilege should not be lost when true legal advice or lawyer's work is performed, albeit in support of an accounting or financial reporting function).

The Seventh Circuit explained the distinction, in the context of an IRS audit, by stating that where representation during an audit consists of "merely verifying the accuracy of a return," it is "accountants' work"; but, if the attorney participates in the audit "to deal with issues of statutory interpretation or case law" that may have been raised in connection with examination of the taxpayer's return, "the lawyer is doing lawyer's work and the attorney-client privilege may attach." *Frederick*, 182 F.3d at 502. Furthermore, in *United States v. El Paso Co.*, the Fifth Circuit addressed the distinction as it applies specifically to tax accrual workpapers by observing that, while preparation of tax accrual work papers might be considered an accounting function, "we would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return and his judgment on the outcome of the litigation on it are not legal advice." *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982).

Here, since the tax accrual workpapers of Textron and TFC essentially consist of nothing more than counsel's opinions regarding items that might be challenged because they involve areas in which the law is uncertain and counsel's assessment regarding Textron's chances of

prevailing in any ensuing litigation, they are protected by the attorney-client privilege.

The IRS's reliance on *Arthur Young* is misplaced because, although *Arthur Young* deemed tax accrual workpapers pinpointing the "soft spots" on a corporation's tax return *relevant* to examination of the corporation's return, it did not hold the attorney-client privilege inapplicable to legal conclusions of counsel contained in the workpapers. On the contrary, *Arthur Young* expressly recognized that "§ 7602 is 'subject to the traditional privileges and limitations.'" *Arthur Young,* 465 U.S. at 816 (citation omitted). *Arthur Young* also is distinguishable on the ground that, there, the workpapers had been prepared by the corporation's independent auditor whose "obligation to serve the public interest assures that the integrity of the securities markets will be preserved." *Arthur Young,* 465 U.S. at 819. By contrast, Textron's workpapers were prepared by its counsel whose function was to provide legal advice to Textron.

B. *Tax Practitioner-Client Privilege—§ 7525*

Section 7525, which created a tax practitioner privilege, was enacted after the Supreme Court's decision in *Arthur Young,* which declined to create a new "accountant-client privilege" between a corporation and its independent auditor. *Arthur Young,* 465 U.S. at 817. Section 7525 confers a privilege on tax advice in the form of confidential communications "between a taxpayer and any federally authorized tax practitioner" to the same extent that such communications would be protected between a taxpayer and an attorney. 26 U.S.C. § 7525(a)(1).

In the case of a corporation, the privilege does not apply to written communications between the tax practitioner and the corporation "in connection with the pro-

motion of the direct or indirect participation of such corporation in any tax shelter (as defined in section 6662(d)(2)(C)(iii))." 26 U.S.C. § 7525(b) (2001). Nor does the privilege extend to a tax practitioner's "work product" in *preparing* a return or to "communications between a tax practitioner and a client simply for the preparation of a tax return." *United States v. KPMG, LLP*, 316 F. Supp. 2d 30, 35 (D.D.C. 2004) ("nothing in the statute 'suggests that these nonlawyer practitioners are entitled to privilege *when they are doing other than lawyers' work*'") (emphasis in original) (citation omitted).

Textron argues that, to the extent that the workpapers in question reflect the advice that TFC received from CPAs in its tax department, they are privileged under § 7525. The IRS argues that the opinions of TFC's tax accountants do not qualify for protection under § 7525(a); and, even if they did, they fall within the exception contained in § 7525(b).

Since TFC's tax accountants participated in advising Textron regarding its tax liability with respect to matters on which the law is uncertain and/or estimating the hazards of litigation percentages, they were performing "lawyers' work." Accordingly, that advice would qualify for the privilege conferred by § 7525(a). *See* 26 U.S.C. 7525(a) (tax advice communications protected "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.").

In support of its argument that the written communications from TFC's tax accountants fall within the "promotion" of a tax shelter exception created by § 7525(b), the IRS points out that 26 U.S.C. § 6662(d)(2)(C)(ii) defines "tax shelter" to include any arrangement "a significant purpose" of which "is the avoidance or evasion of

Federal income tax" and that an IRS notice identifies SILO transactions as a type of tax avoidance arrangement. *See* 26 C.F.R. § 1.6011-4(b)(2); IRS Notice 2005-13 (February 11, 2005), 2005-9 I.R.B. 630. That argument is not persuasive because even if the SILO transactions in which TFC engaged are characterized as "tax avoidance" transactions the communications were not made "in connection with the *promotion*" of TFC's participation in them. 26 U.S.C. § 7525(b) (emphasis added).

Section 7525(b) is aimed at communications by outside tax practitioners attempting to sell tax shelters to a corporate client. *See* 144 Cong. Rec. S7643-02, S7667 (July 8, 1998) (statement of Sen. Mack) ("[section 7525(b)] was meant to target written promotional and solicitation materials used by the peddlers of corporate tax shelters"). As the Conference Report relating to § 7525(b) stated "[t]he Conferees do not understand the promotion of tax shelters to be part of the routine relationship between a tax practitioner and a client. Accordingly, the Conferees do not anticipate that the tax shelter limitation will adversely affect such routine relationships." H.R. Rep. No. 105-599 (Conf. Report to Accompany HR 2676) (June 24, 1998).

Here, TFC's accountants were not "peddlers of corporate tax shelters" or outside promoters soliciting TFC's participation in the SILO transactions. Rather, they were acting as tax advisers and the workpapers reflect their opinions regarding the foreseeable tax consequences of transactions that, already, had taken place, not future transactions they were seeking to promote.

C. *The Work Product Privilege*

1. The Nature of the Privilege

The work product privilege applies to materials prepared or gathered by an attorney in anticipation of litigation or preparation for trial. The purpose of the privilege is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation' free from unnecessary intrusion by his adversaries," *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 685, 393-94, 91 L. Ed. 451 (1947)), "to prevent a litigant from taking a free ride on the research and thinking of his opponent's lawyer and to avoid the resulting deterrent to a lawyer's committing his thoughts to paper." *Frederick*, 182 F.3d at 500.

The privilege first was articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 685, 91 L. Ed. 451 (1947), and, later, was codified in Federal Rule of Civil Procedure 26(b)(3) which provides:

> (3) Trial Preparation Materials . . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . *only* upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required

> showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3) (emphasis added).

As the rule indicates, unlike the attorney-client privilege, the work product privilege is a qualified privilege which may be overcome by a showing of "substantial need." Fed. R. Civ. P. 26(b)(3). The burden of establishing "substantial need" rests on the party seeking to overcome the privilege; and, when "opinion work product" consisting of "mental impressions, conclusions, opinions or legal theories" of attorneys is involved, the burden of establishing "substantial need" is greater than it is with respect to documents that are merely obtained by a party. *Upjohn*, 449 U.S. at 401-2 ("we think a far stronger showing of necessity and unavailability by other means . . . would be necessary to compel disclosure" of opinion work-product.). Indeed, some courts have accorded "nearly absolute" protection to work product consisting of opinions or theories. *In re Grand Jury Subpoena*, 220 F.R.D. 130, 145 (D. Mass. 2004) (collecting cases).

In *Upjohn*, the Supreme Court made it clear that the work product privilege may be invoked in response to IRS summonses.

> [T]he obligation imposed by a tax summons remains 'subject to the traditional privileges and limitations.' . . . Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to prec-

> lude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3).

Upjohn, 449 U.S. at 398-99 (citation omitted).

2. The "In Anticipation of Litigation" Requirement

Courts have applied two different tests in determining whether a document was prepared "in anticipation of litigation." Under the "primary purpose" test, documents are held to be prepared in anticipation of litigation "as long as the primary motivating purpose behind the creation of a document was to aid in possible future litigation." *El Paso*, 682 F.2d at 542. Under the more inclusive "because of" test, the relevant inquiry is whether the document was prepared or obtained "because of" the prospect of litigation. *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). In *Adlman*, after making a detailed analysis of the two tests, the Second Circuit found the "because of" test "more consistent with both the literal terms and the purposes of [Rule 26(b)(3)]" and the Court stated:

> In short, the enforceability of the IRS summons for the Memorandum will turn on whether it (or substantially the same document) would have been prepared irrespective of the anticipated litigation and therefore was not prepared because of it.

Adlman, 134 F.3d at 1198, 1205.

The First Circuit has adopted the "because of" test articulated in *Adlman. Maine v. Dept. of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002).

Textron asserts that its tax accrual workpapers were prepared because it anticipated the possibility of litigation with the IRS regarding various items on its return and it points to the hazards of litigation percentages as evidence that the possibility of such litigation was the reason for preparing the workpapers. The IRS asserts that the workpapers were prepared in the ordinary course of business and in order to satisfy the requirements of the securities laws that financial statements filed by publicly traded companies comply with GAAP (which mandate the creation of reserves to meet contingent liabilities). The IRS contends that Textron had to provide its independent auditor with the kind of information contained in the workpapers in order to obtain a "clean" opinion that the reserves satisfy GAAP's requirements.

As the IRS correctly observes, the work product privilege does not apply to "'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" *Maine*, 298 F.3d at 70 (quoting *Adlman*, 134 F.3d at 1202). However, it is clear that the opinions of Textron's counsel and accountants regarding items that might be challenged by the IRS, their estimated hazards of litigation percentages and their calculation of tax reserve amounts would not have been prepared at all "but for" the fact that Textron anticipated the possibility of litigation with the IRS. If Textron had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve. Thus, while it may be

accurate to say that the workpapers helped Textron determine what amount should be reserved to cover any potential tax liabilities and that the workpapers were useful in obtaining a "clean" opinion from E&Y regarding the adequacy of the reserve amount, there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

Nor can there be any doubt that Textron's belief in the likelihood of litigation with the IRS was well-founded. As already noted, the matters identified in the workpapers dealt with issues on which the law was unclear. Moreover, in seven of Textron's eight previous audit cycles, "unagreed" issues had been appealed to the IRS Appeals Board, and three of those issues were litigated in federal court.

The IRS relies on *El Paso* for the proposition that tax accrual workpapers are prepared in the ordinary course of business; and, therefore, are not protected by the work product privilege. However, *El Paso* is not persuasive because it applied the "primary purpose" test for determining whether documents are prepared "in anticipation of litigation" and not the "because of" test adopted by the First Circuit.

Moreover, even if the workpapers were needed to satisfy E&Y that Textron's reserves complied with GAAP, that would not alter the fact that the workpapers were prepared "because of" anticipated litigation with the IRS. *See Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006). In *Jaffe Pension Plan*, letters obtained by a corporation's shareholders containing an assessment by the corporation's attorney of pending litigation against the corporation

were held to be protected by the work product privilege even though the securities laws required that the letters be provided to the corporation's independent auditor. As the *Jaffe Pension Plan* court stated:

> Plaintiffs insist that "[t]he documents at issue here were created 'pursuant to public requirements unrelated to litigation,' and in fact, would have been created regardless of the litigation." . . . The court disagrees. In the absence of any pending or threatened litigation, Household's counsel would have had no need to advise [the independent auditor] regarding such non-existent matters. Thus, the Opinion Letters were prepared "because of" pending or threatened litigation and are protected by the work product doctrine.

Jaffe Pension Plan, 237 F.R.D. at 181. *See Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (holding that individual case litigation reserves prepared by company's attorney were protected opinion work product).

III. Waiver or Loss of Privilege

A. The Attorney-Client and Tax Practitioner-Client Privileges

It is well established that "voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else." *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991). That principle has been applied specifically to disclosures made to independent auditors. *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263,

268-69 (Fed. Cl. 2003) (attorney-client privilege was waived when board minutes containing confidential communications between board members and outside counsel were disclosed to outside auditors who were auditing company's financial statements); *Gutter v. E.I. Dupont de Nemours & Co.*, 1998 WL 2017926 *5 (S.D. Fla. 1998) (attorney-client privilege for legal opinion letters and litigation reports to the board of directors was waived when disclosed to independent auditor); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125 *7 (S.D.N.Y. 1993) ("Pfizer cannot assert attorney-client privilege for any documents that were provided to its independent auditor. Disclosure of documents to an outside accountant destroys the confidentiality seal required of communications protected by the attorney-client privilege"); *see also Cavallaro*, 284 F.3d at 247-49 (attorney-client privilege was waived when communications were disclosed to outside accountants who were not retained to facilitate legal advice by attorneys).

Since the tax practitioner privilege created by § 7525 mirrors the attorney-client privilege, it, too, may be waived by disclosure to a third party. *See United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003) ("the § 7525 privilege is no broader than that of the attorney-client privilege"); *Doe v. KPMG, LLP*, 325 F. Supp. 2d 746, 752 (N.D. Tex. 2004) (Court must "look to the law of attorney-client privilege to inform its interpretation of the taxpayer-federally authorized tax practitioner privilege.").

Textron argues that providing the tax accrual workpapers to E&Y did not waive the protection of either privilege and it seeks to distinguish the cases holding that disclosure to an outside auditor waives the attorney-client privilege on the ground that those cases were de-

cided prior to the enactment of § 7525. More specifically, Textron argues that, because it occasionally revises its reserves based on the opinions of the independent auditor, the auditor's review of Textron's workpapers should be viewed as performed in connection with providing "tax advice" to Textron and, therefore, it is privileged under § 7525. That argument is creative but not persuasive because it ignores reality to describe an independent auditor responsible for reporting to the investing public whether a company's financial statements fairly and accurately reflect its financial condition, as providing "tax advice" to the company when the auditor seeks to determine the adequacy of amounts reserved by the company for contingent tax liabilities.

In short, any attorney-client privilege or tax practitioner privilege that attached under § 7525 was waived when Textron provided its workpapers to E&Y.

B. The Work Product Privilege

1. Waiver

Since the work product privilege serves a purpose different from the attorney-client or tax practitioner privileges, the kind of conduct that waives the privilege also differs.

The purpose of the attorney-client and tax practitioner privileges is to encourage the full and frank discussion necessary for providing the client with sound advice. That purpose is achieved by guaranteeing that confidential communications between the client and the advisor will remain confidential. Since disclosure to a third party is inconsistent with a claim of confidentiality, such disclosure waives the privilege.

By contrast, the purpose of the work product privilege is to prevent a potential adversary from gaining an

unfair advantage over a party by obtaining documents prepared by the party or its counsel in anticipation of litigation which may reveal the party's strategy or the party's own assessment of the strengths and weaknesses of its case. Accordingly, only disclosures that are inconsistent with keeping the information from an adversary constitute a waiver of the work product privilege. *Gutter*, 1998 WL 2017926 *3 (S.D. Fl. 1998) ("While disclosure to outside auditors may waive the attorney-client privilege, it does not waive the work product privilege"). As the First Circuit stated in *United States v. Massachusetts Institute of Technology*, ("*MIT*"), 129 F.3d 681 (1st Cir. 1997):

> The [attorney-client] privilege . . . is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against "adversaries," so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.

129 F.3d at 687 (collecting cases). *See Jaffe Pension Plan*, 237 F.R.D. at 183 ("[T]he work product privilege may be waived by disclosures to third parties 'in a manner which substantially increases the opportunity for potential adversaries to obtain the information.' ") (citation omitted); *In re Raytheon Sec. Litig.*, 218 F.R.D. at 360 (D. Mass. 2003) ("[D]isclosure of a document to third persons does not waive the protection unless it has substantially increased the opportunity for potential adversaries to obtain the information.").

Most courts considering the question have held that disclosure of information to an independent auditor does

not waive the work product privilege because it does not substantially increase the opportunity for potential adversaries to obtain the information. *In re JDS Uniphase Corp. Sec. Litig.*, 2006 WL 2850049 (N.D. Cal. 2006) (work product protection not waived when protected board minutes were disclosed to the independent auditor); *Jaffe Pension Plan*, 237 F.R.D. at 183 (Because an independent auditor does not have an adversarial relationship with the client, "[d]isclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information."); *Frank Betz Assocs., Inc. v. Jim Walter Homes Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005) (disclosure to independent auditor of documents supporting reserve for copyright infringement litigation did not waive work product protection); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004) (even though an auditor "must maintain an independent role," disclosure to auditor not a waiver of work product privilege because no likelihood that the independent auditors were a conduit to an adversary . . . or that accounting rules would "mandate public disclosure" of the documents); *Gutter*, 1998 WL 2017926 *5, *3 (S.D. Fl. 1998) (work product privilege not waived by disclosure to auditor of letters estimating cost of litigation "since the accountants are not considered a conduit to a potential adversary" and "there is an expectation that confidentiality of such information will be maintained by the recipient."); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125 *6 (S.D.N.Y. 2003) (no waiver of work product privilege because auditor "not reasonably viewed as a conduit to a potential adversary.").

In this case, too, the disclosure of Textron's tax accrual workpapers to E&Y did not substantially increase the IRS's opportunity to obtain the information con-

tained in them. Under AICPA Code of Professional Conduct Section 301 *Confidential Client Information*, E&Y had a professional obligation "not [to] disclos[e] any confidential client information without the specific consent of the client." Furthermore, E&Y expressly agreed not to provide the information to any other party, and confirms that it has adhered to its promise. (Weston Aff. ¶ 3; Raymond Aff. ¶ 20.) Even if the AICPA Code coupled with E&Y's promise did not establish an absolute guarantee of confidentiality, they made it very unlikely that E&Y would provide Textron's "tax accrual workpapers" to the IRS and they negate any inference that Textron waived the work product privilege.[4]

The IRS cites *MIT* for the proposition that disclosure to an independent auditor waives work product protection but that reliance is misplaced because *MIT* is factually distinguishable from this case. The documents at issue in *MIT* were minutes of meetings of the MIT Corporation and some of its committees relating to bills submitted by MIT for services rendered pursuant to a contract with the Department of Defense (DOD). The documents were requested by the Defense Contract Audit Agency (DCAA) in order to confirm that the bills were justified and MIT provided the minutes due, in part, to the fact that DCAA "regulations and practices offered MIT some reason to think that indiscriminate disclosure was unlikely." *MIT*, 129 F.3d at 683. The First Circuit assumed, without deciding, that the documents were protected work product, but held that the docu-

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[4] The IRS points out that Rule 301 provides that it shall not be construed to relieve an auditor of its obligation to adhere to applicable accounting standards set forth by GAAP or auditing standards set forth by GAAS, but there is no indication that compliance with those standards would have required disclosure in this case.

ments had to be produced in response to an IRS summons because disclosure had been made to the DCAA, "a potential adversary." *Id.* at 687.

The difference between this case and *MIT* is that, in *MIT*, DOD was MIT's potential litigation adversary and DCAA, as DOD's audit agency, had both an obligation to DOD to determine whether the amounts charged by MIT to DOD were correct, and the authority to sue MIT in order to recover any overcharges. By contrast, in this case, E&Y was a truly independent auditor that had no obligation to the IRS to determine whether Textron's tax return was correct and no authority to challenge the return. In this instance, E&Y was seeking, only, to determine whether the reserve established by Textron to cover the corporation's contingent tax liabilities satisfied the requirements of GAAP. Since E&Y was not a potential Textron adversary or acting on behalf of a potential adversary, and, since E&Y agreed to treat the workpapers as confidential, disclosure to E&Y did not substantially increase the likelihood that the workpapers would be disclosed to the IRS or other potential Textron adversaries. *See Merrill Lynch*, 229 F.R.D. at 447 (finding no waiver where company shared internal investigative report of executive's theft with independent auditor, and distinguishing *MIT*: "The First Circuit, for example, found that the DOD's audit agency was an adversary because it could potentially dispute a billing charge and file suit against MIT, not because of its duty to review MIT's accounts."); *see also In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125 *6 (finding Pfizer's disclosure to an independent auditor not a waiver of work product protection because "[Pfizer's independent auditor] is not reasonably viewed as a conduit to a potential adversary.").

2. Overcoming the Privilege

As already noted, the work product doctrine creates only a qualified privilege that may be overcome by a showing of (1) "substantial need" for the protected documents, and (2) an inability to otherwise obtain the information contained therein or its substantial equivalent without "undue hardship." Fed. R. Civ. P. 26(b)(3).

While establishing that protected documents relate to a legitimate IRS investigation may satisfy the "relevancy" requirement of § 7602, it is insufficient to establish the "substantial need" showing necessary to overcome the work product privilege. *See Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 436 (D. Me. 2003) ("the fact that the documents sought might be relevant to [plaintiff's] claims is not enough under Rule 26(b)(3)."). That is especially true in the case of opinion work product, which consists of the "mental impressions, conclusions, opinions or legal theories" of attorneys, where the party seeking the materials must meet a heightened burden. *See Upjohn*, 449 U.S. at 401-2 ("a far stronger showing of necessity and unavailability by other means . . . would be necessary to compel disclosure" of attorneys' notes and memoranda regarding oral statements of witnesses which "reveal the attorneys' mental processes in evaluating the communications"); *see also* Fed. R. Civ. P. 26(b)(3) ("In ordering discovery . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.").

Here, the IRS has failed to carry the burden of demonstrating a "substantial need" for ordinary work product, let alone the heightened burden applicable to Textron's tax accrual workpapers, which constitute opi-

nion work product. While the opinions and conclusions of Textron's counsel and tax advisers might provide the IRS with insight into Textron's negotiating position and/or litigation strategy, they have little bearing on the determination of Textron's tax liability.[5] The determination of any tax owed by Textron must be based on *factual* information, none of which is contained in the workpapers and all of which is readily available to the IRS through the issuance of IDRs and by other means. The opinions of Textron's counsel, either favorable or unfavorable, would have little to do with that determination, and forced disclosure of those opinions would put Textron at an unfair disadvantage in any dispute that might arise with the IRS, just as requiring the IRS to disclose the opinions of its counsel regarding areas of uncertainty in the law or the likely outcome of any litigation with Textron would place the IRS at an unfair disadvantage. *See e.g. Delaney, Migdail & Young, Chartered v. IRS,* 826 F.2d 124, 127 (D.C. Cir. 1987) (upholding IRS assertion of work product privilege over "IRS memos advis[ing] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome.").

Conclusion

For all of the foregoing reasons, the government's petition to enforce the summons is denied.

It is so Ordered.

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[5] At the evidentiary hearing, the IRS argued that it is entitled to the tax accrual workpapers because the hazards of litigation percentages would assist in determining whether Textron owes a penalty for underpayment of taxes. Since the IRS has not even asserted that Textron owes any further tax, this argument is premature, at best.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2631

UNITED STATES OF AMERICA, Petitioner, Appellant,

v.

TEXTRON INC. AND SUBSIDIARIES, Respondent, Appellant

Sept. 16, 2009

Before: LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ and HOWARD, Circuit Judges.

Textron, Inc. and Subsidiaries have filed a petition to stay mandate pending the timely filing and resolution of a petition for *certiorari*. Such petitions are not granted as a matter of course but require a judgment about likelihood of a grant and a showing of "good cause."

Textron suggests that the likelihood of a grant of *certiorari* is high and that irreparable injury will result in its absence. The likelihood of *certiorari* is difficult to predict: although the case is certainly important to the IRS and companies that file audited financial statements and are thereafter engaged in tax controversies, the rul-

ing in favor of the IRS is limited to materials prepared in the ordinary course of business and disclosed to auditors, since undisclosed materials generated by lawyers within the corporation are normally protected by the attorney client privilege regardless of whether prepared in anticipation of litigation. Nevertheless, the work product privilege finds its origins in a Supreme Court decision that has not often been revisited by the Court and there is some difference in the interpretations adopted in different circuits even though the two that have addressed tax audit work papers both favor the IRS. Since *certiorari* is at least a possibility and in the present circumstances disclosure pendente lite could deprive Textron of the most effective protection as to the documents at issue, we grant the stay on the customary terms.

On motion of appellee Textron Inc. and Subsidiaries for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for *certiorari* and, if a timely petition for *certiorari* is filed within 90 days of the date of this order, pending a resolution of the petition by the Supreme Court. If the petition for *certiorari* is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Textron Inc. and Subsidiaries is directed to promptly notify the Clerk of this court both of the filing of any such petition for *certiorari* and its disposition.

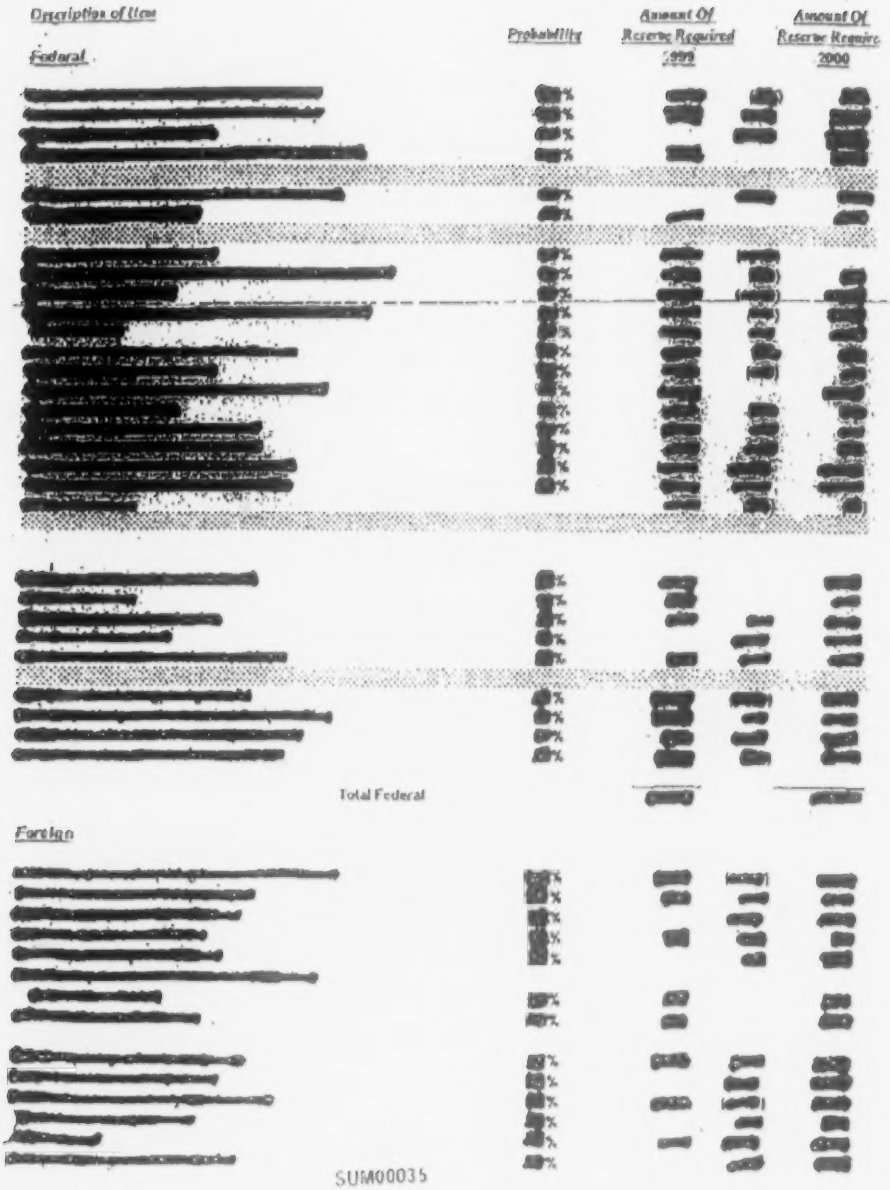
It is so ordered.

By the Court:

/s/ Richard Cushing Donovan, Clerk

Textron Inc. & Subsidiaries
Tax Reserve Analysis
Estimated As of 12/31/00

(000's omitted)



APPENDIX E

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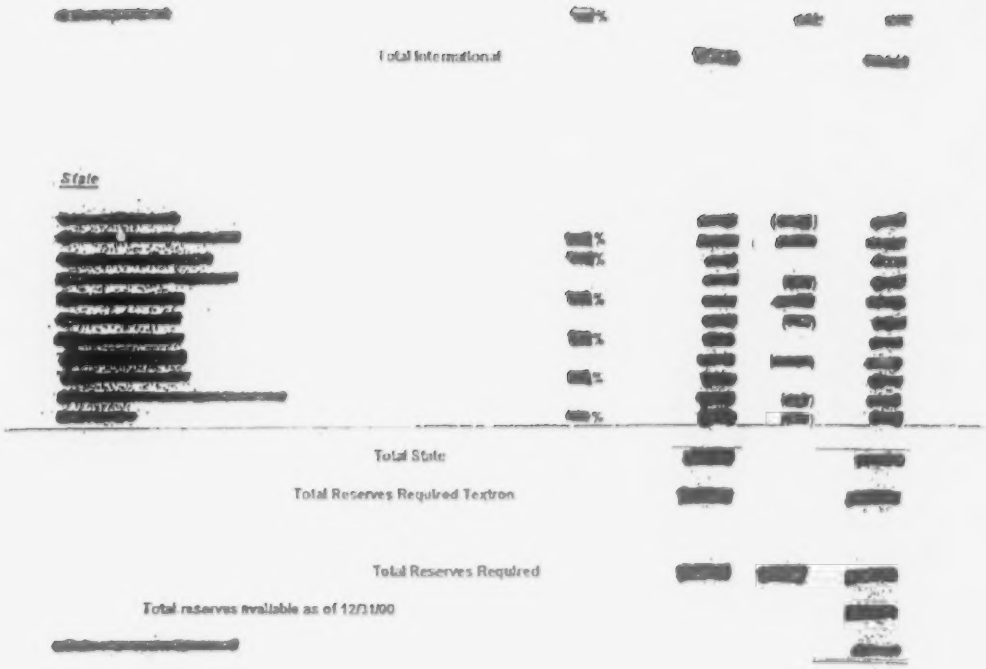
Total International
State
Total State
Total Reserves Required Textron
Total Reserves Required
Total reserves available as of 12/31/00

No. 09-750

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

This case involves documents known as tax-accrual workpapers. The workpapers were created by petitioner, a public corporation, in order to (a) calculate adequate tax reserves for its financial statements and (b) demonstrate to its independent auditor that the financial statements comply with generally accepted accounting principles. The question presented is as follows:

Whether petitioner's tax-accrual workpapers are immune from compelled disclosure to the Internal Revenue Service as attorney work product prepared in anticipation of litigation.

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In the Supreme Court of the United States

No. 09-750

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-46a) is reported at 577 F.3d 21. The opinion of the court of appeals panel (Pet. App. 47a-88a) is unreported but is available at 2009 U.S. App. LEXIS 1538. The opinion of the district court (Pet. App. 89a-118a) is reported at 507 F. Supp. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. On October 20, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including December 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Publicly traded corporations are required by the federal securities laws to file annually with the Securities and Exchange Commission (SEC) financial statements that have been audited by a public accounting firm. Such corporations are also required to obtain from the auditor an unqualified or "clean" opinion that the financial statements conform with generally accepted accounting principles (GAAP).[1] Pet. App. 2a; C.A. App. 208-209, 282-285; see 15 U.S.C. 78m(a)(2); 17 C.F.R. Pt. 210. A company's failure to satisfy those requirements could affect its ability to list its stock on a public exchange. C.A. App. 283. To prepare financial statements that comply with GAAP, public companies must, *inter alia*, calculate reserves to account for deferred and contingent tax liabilities. Those calculations must include estimates of the liability the company would face if the Internal Revenue Service (IRS) were to challenge uncertain positions on the company's self-assessed federal income tax return. Pet. App. 2a; C.A. App. 40-43.

Independent auditors must review the financial statements of their public-company clients according to the standards of the audit profession, which at the time relevant to this case were established by the American Institute of Certified Public Accountants (AICPA) and were known as generally accepted auditing standards (GAAS).[2] 17 C.F.R. 210.1-02(d), 240.13a-1; C.A. App. 40.

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[1] GAAP are established by the Financial Accounting Standards Board (FASB) and published in Statements on Financial Accounting Standards. C.A. App. 40.

[2] In 2003, the Public Company Accounting Oversight Board (PCAOB) assumed responsibility for the promulgation of auditing standards for audits of public companies. C.A. App. 40. The PCAOB adopted substantial portions of GAAS as interim rules. PCAOB R. 3200T.

Those standards require auditors to obtain from the company evidence supporting the accuracy of the financial statements, including evidence regarding its reserve account for deferred and contingent tax liabilities. C.A. App. 40-46, 208-210, 282-287; see AICPA, *AU Section 326: Evidential Matter* (2002), http://pcaobus.org/Standards/Auditing/Pages/AU326.aspx; AICPA, *AU Section 9326: Evidential Matter: Auditing Interpretations of* Section 326 (Apr. 2003) (*AU § 9326*), http://pcaobus.org/Standards/Auditing/Pages/AU9326.aspx.

To demonstrate that the amount it has reserved is consistent with GAAP, a company creates tax-accrual workpapers, which (i) list and analyze each uncertain tax-return position taken by the company, (ii) estimate the likelihood that the position will not withstand scrutiny, and (iii) calculate the additional tax liability that would result from a successful challenge by the IRS. Independent auditors require access to those workpapers in order to provide the clean opinion that the client needs to meet SEC filing requirements and to keep its securities listed on an exchange. Pet. App. 19a-20a; C.A. App. 40-47, 208-210, 282-284. Such documentation is required even if the client does not perceive any possibility of a successful challenge by the IRS, because the client must establish that its reserve of zero is adequate. *Id.* at 285-286.

In performing the audit, the independent auditor generates its own tax-accrual workpapers. The auditor's workpapers must contain an item-by-item analysis of the company's tax-accrual analysis and the auditor's judgment on the correctness of the client's tax position. Pet. App. 2a, 12a; C.A. App. 42-47. In *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984), this Court unanimously held that the IRS may obtain the auditor's tax-

accrual workpapers. The Court explained that those workpapers were "highly relevant" to an IRS audit and that, although the IRS's summons authority is subject to "'traditional privileges and limitations,'" the workpapers are not "protected by some form of work-product immunity." *Id.* at 815 (quoting *United States* v. *Euge*, 444 U.S. 707, 711 (1980)). While recognizing that the auditor's workpapers recorded the taxpayer's own tax-accrual analysis, the Court concluded that the securities laws and auditing standards already required that the auditor have unfettered access to that analysis, and that there was no need to further encourage candor on the taxpayer's part by according a work-product protection to the auditor's tax-accrual workpapers. See *id.* at 817-819 & nn.13-14.

b. Under longstanding policy, the IRS does not routinely seek to obtain tax-accrual workpapers through its summons power, but exercises that authority only in unusual circumstances. See *Arthur Young*, 465 U.S. at 820-821 & n.17; I.R.S. Announcement 84-46, 1984-18 I.R.B. 18; IRS, *Internal Revenue Manual* § 4024.4, at 4000-33 (1981). The IRS's most recent statement of its policy explains that it will seek tax-accrual workpapers if it has reason to believe that a particular company has engaged in one or more specified types of tax-avoidance strategies, known as "listed transactions." I.R.S. Announcement 2002-63, 2002-2 C.B. 72.[3]

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[3] Corporate tax returns have become so complex in recent years that IRS revenue agents are forced to spend considerable time simply searching for the uncertain issues that need to be audited rather than discussing those issues with the taxpayer. IRS, IR-2010-013, *Prepared Remarks of IRS Commissioner Doug Shulman to New York State Bar Association Taxation Section Annual Meeting in New York City* (Jan. 26, 2010), http://www.irs.gov/newsroom/article/0,,id=218705,00.html.

c. Recognizing that the IRS possesses (though it rarely exercises) the authority to obtain tax-accrual workpapers, the AICPA and the Financial Accounting Standards Board (FASB) have long advised that such workpapers are indispensable to a public-company audit even though the "IRS could legally" obtain them. AICPA, *Practice Guide on Accounting for Uncertain Tax Positions Under FIN 48*, at 12 (2006). In this regard, the AICPA has warned that a public company's failure to provide its auditors with sufficient information regarding the company's tax accrual could negatively impact the auditor's ability to certify the financial statements. *AU § 9326* ¶¶ 2.06-2.14. FASB has rejected complaints by public companies about financial-accounting rules that require them to create documents that could assist the IRS. In doing so, FASB has emphasized that accounting rules appropriately "provide a 'roadmap' for taxing authorities," noting that the taxing authorities are "acting in the broader public interest in regulating compliance with self-reporting income tax laws." FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes, App. B: Background Information & Basis for Conclusions* ¶ B64 (2006) (*FIN 48*).

2. Petitioner is a publicly traded company. During its audit of petitioner's 2001 tax return, the IRS learned

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In an effort to resolve that problem, the Commissioner of Internal Revenue has proposed that certain large business taxpayers be required to disclose on their annual tax returns any tax position that they, or their independent auditors, have determined to be an uncertain one. I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408; see also I.R.S. Announcement 2010-17, 2010-13 I.R.B. 515 (extending comment period). That proposal would not affect tax-accrual workpapers. Rather, the existing policy of restraint described in the text would continue to apply. See 2010-7 I.R.B. at 409.

that petitioner had repeatedly engaged in listed transactions (of a form known as the "Sale-In, Lease-Out" (SILO) tax shelter) that the IRS had determined were abusive.[4] The IRS accordingly issued a summons to petitioner, seeking petitioner's tax-accrual workpapers for the audit of its 2001 financial statements, as well as the tax-accrual workpapers generated by petitioner's independent auditor for that year. Pet. App. 2a-5a; C.A. App. 10-28.

Petitioner's tax-accrual workpapers were created annually by accountants and attorneys in its Tax Department, and then reviewed by its independent auditor, Ernst & Young (E&Y). Petitioner's workpapers consisted of (i) a spreadsheet listing every material item in petitioner's tax return that, if challenged by the IRS, could result in additional taxes being assessed; and (ii) documents supporting the reserve calculations on the spreadsheet. Pet. App. 3a. For each uncertain tax position, the spreadsheet calculated a reserve amount by multiplying the dollar amount subject to possible dispute by the percentage estimate of the IRS's chances of success. *Id.* at 2a-3a; C.A. App. 83, 161-166. The workpapers included items that petitioner intended to concede, such as items that had been resolved in prior audits. *Id.* at 80, 83. Petitioner's employees testified that they had created those workpapers in order to establish a GAAP-compliant tax reserve on the company's financial statements and to demonstrate the accuracy of those statements to its auditor (as securities laws and auditing

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[4] See generally, *e.g.*, *Wells Fargo & Co.* v. *United States*, 91 Fed. Cl. 35, 39 (2010) (explaining why the SILO tax shelter is without economic substance, and stating that the shelter is "offensive to the Court on many levels").

standards required). Pet. App. 13a-14a; C.A. App. 82, 92-93, 168-169, 175-176, 208-209.

Petitioner refused to produce any of the requested documents. It asserted, *inter alia*, that its workpapers were protected as attorney work product. Pet. App. 5a. The government petitioned the United States District Court for the District of Rhode Island to enforce the summons.

3. The district court denied the government's petition for enforcement. Pet. App. 89a-118a.

a. The district court first determined that the threshold requirements for a summons had been satisfied. See *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). In particular, the court rejected petitioner's contention that the summons had been issued for an improper purpose. Pet. App. 95a-99a. As petitioner's senior tax attorney conceded, the IRS was not always able to spot all of the uncertain tax positions that petitioner itself had identified, given the complexities of petitioner's consolidated tax return (which for the 2001 tax year exceeded 4000 pages). C.A. App. 214. The district court concluded that the summons was a valid effort to ensure that petitioner's 2001 tax liability was correctly determined. Pet. App. 97a.

b. The district court held, however, that petitioner's tax-accrual workpapers were protected as work product. The court recognized that the First Circuit applies work-product protection to documents created "because of" the prospect of litigation. Pet. App. 107a-108a (quoting *Maine* v. *United States Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002)). The court noted that the "because of" standard is "more inclusive" (*i.e.*, protects more documents) than the standard applied in the Fifth Circuit, which examines whether the "primary purpose"

for creating a document was to aid in litigation. *Id.* at 107a (quoting *United States* v. *El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984)).

The district court found that petitioner had generated its workpapers to establish a reserve on its financial statements and to demonstrate to its auditor that the reserve complied with GAAP so that the auditor would render a "clean" opinion. Pet. App. 93a-94a. The court did not find that petitioner intended to use these workpapers to assist in the conduct of future litigation, or that the workpapers related to any existing or expected lawsuit. Rather, the court determined that the tax-accrual workpapers were work product notwithstanding their regulatory purpose because they "would not have been prepared at all 'but for' the fact that [petitioner] anticipated the possibility of litigation with the IRS." *Id.* at 108a. The district court concluded on that basis that the tax-accrual workpapers had been prepared "because of" litigation. See *id.* at 108a-110a. The court also determined that, although petitioner had waived any claim of attorney-client or tax-practitioner privilege by disclosing its tax-accrual analysis to E&Y, *id.* at 110a-112a, the work-product protection survived the disclosure, *id.* at 112a-116a.

4. The government appealed both the holding that the tax-accrual workpapers were shielded by the work-product protection and the holding that petitioner had not waived that protection.[5] In their briefs on appeal, the government and petitioner agreed that the decision in *Maine*, *supra*, was the controlling precedent in the

[5] The government also appealed the district court's failure to address the aspect of the summons that directed petitioner to produce E&Y's workpapers if it could. Gov't C.A. Br. 74-77.

First Circuit and that the court of appeals should apply the "because of" test. The parties disagreed, however, on whether tax-accrual workpapers are protected under that standard. See, *e.g.*, Gov't C.A. Br. 28-29, 36, 47; Pet. C.A. Br. 36.

5. A divided panel of the court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 47a-88a.

a. The panel majority held that petitioner's tax- accrual workpapers were work product because they were "dual purpose documents" generated both "to assist in litigation" and "to comply with securities requirements." Pet. App. 62a-64a. The majority concluded that "the anticipation of litigation coupled with securities and reporting requirements * * * effectively forced [petitioner] to operate under the hypothetical belief that litigation would occur" over each disputable tax position on its return. *Id.* at 72a.

The panel further concluded, however, that petitioner might have waived any work-product protection by disclosing its workpapers to E&Y, and it ordered a remand for the district court to address that issue. Pet. App. 74a-78a. The panel recognized that, under *Arthur Young*, the IRS could obtain E&Y's own workpapers, and that E&Y's workpapers would likely "incorporate [petitioner's] analysis." *Id.* at 76a. The court accordingly directed the district court to make factual findings regarding "the actual contents of E&Y's workpapers" and "the extent to which disclosure of such workpapers would effectively constitute disclosure of [petitioner's] own assessment." *Id.* at 76a-77a.[6]

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[6] The panel also held that the district court should have addressed the request for E&Y's workpapers, and that petitioner had no basis

b. Judge Boudin dissented from the panel's holding that the tax-accrual workpapers were protected work product. He found that holding to be "at odds with" the First Circuit's analysis in *Maine*, *supra*, which he termed "the governing rubric." Pet. App. 84a, 88a. In *Maine*, the court of appeals had stated that documents that are required to be created for non-litigation purposes are not work product, even if those documents discuss litigation. 298 F.3d at 70. In Judge Boudin's view, *Maine* therefore "squarely answer[ed] the question" presented in this case. Pet. App. 83a.

6. The government sought rehearing en banc, which the court of appeals granted. On rehearing, the parties again agreed that the "because of" standard adopted in *Maine* should govern. *E.g.*, Gov't Supp. C.A. Br. 2.

7. The en banc court of appeals reversed in an opinion by Judge Boudin, holding that petitioner's tax-accrual workpapers were not protected work product. Pet. App. 1a-46a.

a. The en banc court held that petitioner's workpapers were not protected as attorney work product because they "were prepared in the ordinary course of business" and "were independently required by statutory and audit requirements." Pet. App. 9a, 18a. In reaching that conclusion, the court expressly "reaffirm[ed] *en banc*" its prior ruling in *Maine*, which had adopted the "because of" test for work-product protection. *Id.* at 9a. The court further reaffirmed that, under that test, "work product protection does not extend to 'documents that are prepared in the ordinary course of business or that would have been created in essentially

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(such as privilege) for withholding those workpapers if it possessed them. The panel remanded for factual findings regarding whether petitioner could obtain the workpapers from E&Y. Pet. App. 78a-80a.

similar form irrespective of the litigation.'" *Id.* at 18a (quoting *Maine*, 298 F.3d at 70).

The en banc court held that petitioner's tax-accrual workpapers were prepared in "the ordinary course of business," and that their "only purpose" was to permit petitioner to comply with certain "statutory and audit requirements." Pet. App. 9a, 18a. The court rejected, as factually unsupported, petitioner's argument that the workpapers had a dual purpose and were created "for use" in litigation as well as for financial-reporting purposes. *Id.* at 11a-15a. The court explained that the district court had not found "that the work papers were prepared *for use* in possible litigation—only that the reserves would cover liabilities that might be determined in litigation." *Id.* at 11a. The en banc court further concluded that, "[i]f the [district] judge had made a 'for use' finding—which he did not—that finding would have been clearly erroneous." *Id.* at 11a-12a.

The en banc court noted that the protection of attorney work-product is "aimed centrally at protecting the *litigation process*" and is not "designed to help the lawyer prepare corporate documents or other materials prepared in the ordinary course of business." Pet. App. 19a. The court rejected petitioner's argument that producing tax-accrual workpapers to the IRS would chill their creation in the future, noting that public companies were legally obligated to create those workpapers "to comply with the securities laws and accounting principles." *Ibid.* The court also emphasized that the IRS faces "practical problems * * * in discovering underreporting of corporate taxes" given the length and complexity of corporate tax returns, and that permitting the IRS to obtain tax-accrual workpapers "serves the legitimate, and important, function of detecting and dis-

allowing abusive tax shelters" lurking in a lengthy return. *Id.* at 20a-21a.

b. Judge Torruella dissented, joined by Judge Lipez. Pet. App. 21a-46a. The dissenting judges would have held that petitioner's tax-accrual workpapers were created for both business and litigation purposes and therefore should be protected under the "because of" work-product test set out in *Maine*. *Id.* at 34a-43a. The dissenters concluded that petitioner's tax-accrual workpapers were prepared "because of" litigation because "the driving force behind the preparation" of those workpapers "was the need to reserve money" in order "to fund payment of tax disputes." *Id.* at 40a.

8. The en banc court of appeals granted petitioner's unopposed motion to stay the mandate, noting that disclosure *pendente lite* would prejudice petitioner. Pet. App. 119a-120a. In granting that relief, the court explained that its ruling was "limited to materials prepared in the ordinary course of business and disclosed to auditors, since undisclosed materials generated by lawyers within the corporation are normally protected by the attorney client privilege regardless of whether prepared in anticipation of litigation." *Id.* at 120a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. No court of appeals has held that tax-accrual workpapers are protected as work product. Indeed, every court of appeals that has considered the issue agrees with the decision below that, wherever the outer boundary of work-product protection may be drawn, it does not encompass documents that were, like the documents at issue here, generated in the ordinary

course of business. This case therefore does not present a suitable occasion for this Court to address the nearly 30-year-old circuit conflict over how to phrase the generally applicable test for work-product protection. Further review is not warranted.

1. The court of appeals' ultimate holding—that tax-accrual workpapers are not protected work product—does not conflict with any decision of another court of appeals. The only other court of appeals to have considered the issue also concluded (applying a different standard) that the work-product protection does not cover a public company's tax-accrual workpapers. See *United States* v. *El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984); see also Pet. 15, 20 (acknowledging that *El Paso* involved documents indistinguishable from those at issue here). In the nearly 30 years since *El Paso*, none of the thousands of publicly traded companies that share tax-accrual workpapers with their independent auditors every year has persuaded a federal court of appeals to accord work-product protection to those workpapers.[7] And during that time, this Court in *Arthur Young* expressly declined to recognize a work-product or analogous protection for the tax-accrual workpapers created and maintained by the outside auditor, which are closely related to the corporate workpapers at issue here, see, *e.g.*, Pet. App. 76a-77a.

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[7] As explained above, the IRS seeks tax-accrual workpapers only rarely. See p. 4, *supra*. The only other case involving tax-accrual workpapers that petitioner cites (Pet. 19) is an unpublished district-court decision, from which the appeal was dismissed when the corporation agreed to produce the documents. See Stipulation to Dismiss Appeal, *Regions Fin. Corp.* v. *United States*, No. 08-13866-C (11th Cir. filed Dec. 24, 2008).

Petitioner contends (Pet. 19-20) that cases from two other circuits extended work-product protection to documents that "do not meaningfully differ from" tax-accrual workpapers, and that its workpapers "would surely be covered under the 'because of' standard" as applied by those circuits. Petitioner's reliance on those decisions is misplaced. Both cases involved documents that allegedly "sought to protect [the company] from future litigation about a particular transaction," not documents prepared regularly, in the ordinary course of business, to satisfy a regulatory requirement. *United States* v. *Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (citation omitted); see *id.* at 598 ("[i]n the absence of any evidence to the contrary," corporation had shown that its memoranda were not prepared "as part of the ordinary course of business"); accord *United States* v. *Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998) (remanding for determination whether substantially the same memorandum would have been prepared in the ordinary course of business).[8] And as discussed below, the en banc court's application of the "because of" standard in this case is entirely consistent with the application of that standard in the Second, Sixth, and other circuits.

2. In the absence of any circuit conflict involving documents prepared to satisfy the particular regulatory requirements at issue here, petitioner contends that cases drawn from other contexts show that it would be entitled to work-product protection in other circuits.

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[8] Petitioner (Pet. 13) and its amici (*e.g.*, New Eng. Legal Found. Br. 7-8) construe the Second Circuit's decision in *Adlman* to hold that the relevant document was protected as work product. In fact, the court of appeals remanded that case for the district court to determine whether the document had been generated in the ordinary course of business, in which case it would *not* be protected. See *Adlman*, 134 F.3d at 1204.

But petitioner's description of the decision below disregards important aspects of both the en banc court's legal analysis and the court's understanding of the factual record.

First, the court of appeals did not depart in this case from the "because of" standard applied by most circuits. The First Circuit has adhered to the "because of" standard ever since its decision in *Maine* v. *United States Dep't of the Interior*, 298 F.3d 60 (2002), which the court "reaffirm[ed] *en banc*" in this case. Pet. App. 9a. Far from adopting a new standard, the court of appeals explained that documents prepared in the ordinary course of business have never been protected by the "because of" standard as elucidated in *Maine*; in the Second Circuit's decision in *Adlman*, *supra*; or elsewhere. See, *e.g.*, *id.* at 9a, 18a. Judge Boudin had previously made the same points in his dissent from the panel decision in this case. See *id.* at 83a, 84a, 85a, 88a (explaining that the First Circuit's decision in *Maine*, which relied on *Adlman*, provides the "governing rubric" that "squarely answers" the question).

Second, the court of appeals expressly concluded that the sole purpose of petitioner's tax-accrual workpapers was to comply with regulatory requirements, and that those workpapers were not assembled (primarily, secondarily, or at all) to prepare for litigation. Petitioner repeatedly asserts (Pet. 13, 18, 19, 23-24) that its workpapers were prepared in part for a litigation-related purpose.[9] But as the en banc court explained, the sole scrap of testimony on which petitioner relies "was *not* adopted by the district judge and [was] more than dubi-

[9] Petitioner, its amici, and the dissenting judges on the en banc court also incorrectly treat all dealings with the IRS as "litigation." See pp. 27-28, *infra*.

ous." Pet. App. 14a; see *id.* at 14a n.5 (explaining that the testimony of petitioner's Vice President of Taxes was inconsistent with that witness's own affidavit and "was not supported by detail or explanation in the record"). The en banc court ruled against petitioner not on the ground that dual-purpose documents fall outside the work-product protection, but because the record showed that petitioner's tax-accrual workpapers serve only a single purpose—a business purpose. See *id.* at 11a-12a ("If the [district] judge had made a 'for use' finding—which he did not—that finding would have been clearly erroneous.").[10]

3. Because petitioner's tax-accrual workpapers were created in the ordinary course of business for a regulatory rather than a litigation purpose, petitioner could not prevail under either of the competing formulations of the work-product doctrine. Petitioner (Pet. 12-20) and its amici are substantially correct in identifying a 28-year-old conflict between the "because of" standard, which is applied by the First Circuit and by many other courts of appeals, and the "primary purpose" standard, which has been endorsed only by the Fifth Circuit. That conflict does not affect the disposition of this case, however, since the "because of" standard applied by the court below provides *broader* work-product protection

[10] That factual conclusion was a sufficient basis to reject petitioner's claim that its tax-accrual workpapers were protected "dual-purpose documents." The government also argued below that, because petitioner's tax-accrual workpapers were generated in the ordinary course of business and to satisfy regulatory requirements, petitioner could not prevail on its work-product theory even if it could establish that those documents also had a litigation-related purpose. See Gov't C.A. Br. 52; Gov't C.A. Reply Br. 31; Gov't C.A. Supp. Br. 8-12. The en banc court of appeals' analysis of the record made it unnecessary for the court to reach that question.

than the competing "primary purpose" test. Indeed, petitioner concedes (Pet. 20) that it could not prevail under the Fifth Circuit's approach, and it identifies no court of appeals decision suggesting that documents generated in the ordinary course of business to satisfy regulatory requirements are protected work product. See pp. 18-21, *infra*. This case would therefore be an unsuitable vehicle for choosing between the competing formulations used to describe the scope of the work-product protection.[11]

The work-product protection derives from this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), and is now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Protected work product comprises documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A). Although Rule 26(b)(3) does not detail exactly what documents are protected, the Rule was promulgated with the understanding that the work-product doctrine would not apply

[11] Petitioner contends (Pet. 30) that the Court should overlook this case's unsuitability for plenary review because the Court may not soon "have the opportunity to [consider the question presented] again." As this Court recently made clear, however, there are "established mechanisms for appellate review" of orders resolving work-product claims. *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 603 (2009). The courts of appeals regularly consider those issues in various procedural postures. See, *e.g.*, *Biegas* v. *Quickway Carriers, Inc.*, 573 F.3d 365, 381-382 (6th Cir. 2009) (appeal from final judgment); *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980 (4th Cir. 1992) (appeal from denial of motion to enforce third-party subpoena). And litigants regularly seek review in this Court, including review of the Fifth Circuit's "primary purpose" test. See, *e.g.*, *Kaiser Aluminum & Chem. Corp.* v. *Department of Labor, Mine Safety & Health Admin.*, 532 U.S. 919 (2001) (No. 00-770) (denying certiorari petition that asked this Court to resolve, *inter alia*, split between the Fifth Circuit's test and other circuits' "because of" test).

to "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970) (1970 Committee Note).

Applying that limitation to the facts of this case, the en banc court of appeals held that petitioner's tax-accrual workpapers were not protected by the work-product protection because they "were prepared in the ordinary course of business." Pet. App. 18a (quoting *Maine*, 298 F.3d at 70). In so holding, the court did not, as petitioner contends (Pet. 11, 24), announce a "novel limitation" or "narrow" the work-product doctrine. Rather, the court simply applied a pre-existing limitation that has long been recognized by every court of appeals that has considered the issue.

The courts of appeals agree that "not all work undertaken by lawyers finds protection in the work-product privilege," and that the protection does not apply "to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes." *In re Sealed Case*, 146 F.3d 881, 887 (D.C. Cir. 1998) (internal quotation marks and citation omitted); see *Adlman*, 134 F.3d at 1202 ("[I]t should be emphasized that the 'because of' formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well established that work-product privilege does not apply to such documents.") (citing 1970 Committee Note); *Martin* v. *Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993) ("[T]he drafters of Rule 26(b)(3) excluded from the rule's protection '[m]aterials assembled in the ordinary course of business, or pursu-

ant to public requirements unrelated to litigation, or for other nonlitigation purposes.'") (quoting 1970 Committee Note); *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) ("[M]aterials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3)."); *Roxworthy*, 457 F.3d at 593 ("It is clear that documents prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes, are not covered by the work product privilege.") (citing 1970 Committee Note); *Binks Mfg. Co.* v. *National Presto Indus., Inc.*, 709 F.2d 1109, 1119-1120 (7th Cir. 1983) (holding that there was no work-product protection for documents generated in the "ordinary course of business") (internal quotation marks and citation omitted); *Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.) (stating that "'there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation,'" and denying protection for documents that were not "prepared for purposes of litigation") (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024, at 198-199 (1970) (Wright & Miller 1970)), cert. denied, 484 U.S. 917 (1987).

Petitioner is also wrong in asserting (Pet. 16-17) that the en banc court diverged from other circuits' application of the "because of" test when it observed that the work-product protection applies only to documents that have some litigation-related "use" or "purpose." Other courts of appeals have similarly recognized that the work-product protection applies only to documents that

have a litigation purpose. See *Roxworthy*, 457 F.3d at 595 (agreeing that "documents are not protected if they were created for nonlitigation purposes, regardless of content"); *Holmes* v. *Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000) ("A party claiming work- product immunity bears the burden of showing that the materials in question were prepared in the course of preparation for possible litigation.") (internal quotation marks and citation omitted); *Mercator Corp.* v. *United States (In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002)*, 318 F.3d 379, 384 (2d Cir. 2003) (stating that the purpose of the work-product protection is to "shelter[] the mental processes of an attorney as reflected in documents prepared for litigation"); *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 910 (9th Cir. 2004) (holding that "documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole"); *In re Sealed Case*, 146 F.3d at 887 (stating that the work-product protection "has no applicability to documents prepared by lawyers" for "nonlitigation purposes").[12]

Petitioner is therefore incorrect in asserting (Pet. 18-19) that in other circuits tax-accrual workpapers would be protected on the theory that they would not have

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[12] The Second Circuit in *Adlman* questioned whether work-product protection required a litigation-related use, but it did not decide the issue. See 134 F.3d at 1197-1199, 1203-1204. Neither petitioner nor its amici have identified any court of appeals decision applying work-product protection to a document that was not generated at least in part for a litigation purpose.

been generated "but for" the prospect of litigation. That theory, which the district court adopted, confuses the workpapers' content with their function. As the en banc court of appeals correctly explained, it is insufficient "to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated." Pet. App. 16a. Rather, in any work-product determination, the "critical" issue is the purpose or "function" for which a document is created. *Delaney, Migdail & Young, Chartered* v. *IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987); see, *e.g.*, *Roxworthy*, 457 F.3d at 595 (stating that the "key issue in determining whether a document should be withheld is the function that the document serves," not its "content"); *Martin*, 983 F.2d at 1260 n.6 (stating that "a party's motivation in preparing a document" determines whether the work-product protection applies).

That tax-accrual workpapers could (in some instances) describe potential litigation does not mean that they are generated "because of" litigation. They are created because "statutory and audit requirements" mandate that they be created. Pet. App. 9a. Satisfying those requirements is the workpapers' function; describing the consequences that will likely follow from petitioner's assertion of uncertain tax positions (including the likely outcome of hypothetical litigation) is the workpapers' content. Petitioner's "but for" analysis misapplies the "because of" work-product test because it disregards the motivation behind the creation of tax-accrual workpapers. Cf. *El Paso*, 682 F.2d at 535 ("primary purpose" test similarly turns on the reason for creating a document, not on what the document contains).

4. Limiting work-product protection to documents that have some potential litigation purpose is consistent

with both the language and the purpose of Rule 26(b)(3). The court of appeals was therefore correct in concluding that tax-accrual workpapers are not protected work product.

a. Rule 26(b)(3)(A) generally protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial." Petitioner (Pet. 9-10, 20) and its amici (*e.g.*, DRI Br. 11-12) suggest that the court of appeals' decision limits the work-product protection to materials "prepared for trial" and therefore renders superfluous the Rule's reference to materials "prepared in anticipation of litigation." That is incorrect. The en banc court of appeals summarized its analysis by explaining that "the work product privilege is aimed at protecting work done for litigation." Pet. App. 21a; see *id.* at 15a ("From the outset, the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated."); *id.* at 17a (referring to "materials prepared for a current or possible * * * law suit"). The court's more general references to materials prepared for "litigation" or for a "law suit" belie petitioner's contention that the court limited the protection to materials prepared "for trial."

Rule 26(b)(3)'s reference to materials prepared "in anticipation of litigation" does not support petitioner's contention that the work-product protection covers tax-accrual workpapers. Rather, as the court of appeals explained, that phrase confirms that the work-product protection shields work that is done for litigation but in advance of a lawsuit's commencement. Pet. App. 16a. That common-sense reading of Rule 26(b)(3) is supported by the Advisory Committee's notes on the Rule, which explain that work-product protection does not

extend to documents that were generated for a nonlitigation purpose: "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." 1970 Committee Note. The en banc court of appeals acknowledged that materials "prepared for potential use in litigation if and when it should arise" had sometimes been given work-product protection, but it found "no evidence in this case that [petitioner's] work papers were prepared for such a use or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose." Pet. App. 18a-19a. Given that assessment of the record, the court correctly held that petitioner's tax-accrual workpapers were not prepared "in anticipation of litigation" within the meaning of Rule 26(b)(3).

b. For similar reasons, the court of appeals' decision is fully consistent with the policies underlying the work-product protection. Those policies are not divorced from preparation for lawsuits, as petitioner (Pet. 16-17) and certain amici (*e.g.*, Ass'n of Corporate Counsel Br. 7-8) suggest. The very work-product standard that petitioner and the amici endorse—the "because of" work-product test—was developed out of recognition that "'[p]rudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced.'" *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (quoting 8 Wright & Miller 1970, at 198-199); accord *Martin*, 983 F.2d at 1260; *Binks*, 709 F.2d at 1118-1120; see also *In re Sealed Case*, 146 F.3d at 884 ("By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written

materials, the privilege protects the adversary process."). See generally, *e.g.*, *Hickman*, 329 U.S. at 497 (adopting work-product protection for materials prepared "by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen").[13]

Nor will providing the IRS access to a company's tax-accrual workpapers have a "chilling effect" on the creation of those documents, as petitioner (Pet. 23) and a number of its amici assert. A publicly traded company seeking an attestation that its financial statements comply with GAAP must permit its independent auditor to verify that those financial statements adequately reserve against tax contingencies. The auditor, in turn, is required by applicable auditing standards—now incorporated into federal law—to review sufficient documentation to understand the basis for the amount reserved and to verify that the reserve is adequate. *AU § 9326* ¶¶ 2.09-2.23. Petitioner's assertion that federal auditing standards do not require "the form and detail of the documents prepared here," Pet. 24 n.9 (quoting Pet. App. 32a (Torruella, J., dissenting)), is beside the point: GAAP requires the client to reserve for contingencies, and auditing standards require the auditor to review the basis for that reserve. There is no reason to suppose that the possibility of compelled disclosure to the IRS will induce publicly traded companies to breach their

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[13] In *Hickman*, this Court noted that English courts had developed a work-product privilege that applied to documents generated for the purpose of "assisting the deponent or his legal advisers in any actual or anticipated litigation." 329 U.S. at 510 n.9 (internal quotation marks and citation omitted). In describing the relevant history in that manner, the Court did not suggest that it was adopting a protection more expansive than its English counterpart.

obligation to prepare tax-accrual workpapers that are both accurate and sufficiently detailed to enable auditors to verify the adequacy of company reserves. Cf. 15 U.S.C. 7242 (unlawful to mislead public company's auditor).

Indeed, this Court made a similar point in *Arthur Young*. Rejecting the argument that disclosure of the auditor's tax-accrual workpapers would discourage companies from performing candid tax-accrual analysis, the Court observed that "[r]esponsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 818-819 (1984). The Court explained that, if the independent auditor thought that "the scope of the examination had been limited by management's reluctance to disclose matters relating to the tax accrual reserves," then the auditor could not issue a clean opinion. *Id.* at 818. The undisputed testimony here confirms the Court's analysis (C.A. App. 43, 46-47, 282-284), as does guidance from the AICPA. See *AU § 9326* ¶ 2.09 ("The client is responsible for its tax accrual, the underlying support for the accrual, and the related disclosures. Limitations on the auditor's access to information considered necessary to audit the tax accrual will affect the auditor's ability to issue an unqualified opinion on the financial statements.").

c. The court of appeals correctly applied its standard to the facts before it and concluded that tax-accrual workpapers are prepared for a business purpose rather than for litigation. See pp. 10-11, *supra*. As the former Chief Auditor of the PCAOB testified, accounting standards compel public companies to create tax-accrual

workpapers in substantially the same form whether or not litigation is anticipated. C.A. App. 277-286, 304.[14] Petitioner admitted that its workpapers included items that it intended to concede (and therefore never litigate) if the IRS were able to discover them during the audit, and that in each audit cycle, petitioner typically agrees to hundreds of IRS adjustments without any dispute. *Id.* at 80, 83, 244-249. Indeed, petitioner has never claimed (and the district court did not find) that any of the uncertain items listed in petitioner's tax-accrual workpapers related to existing or expected litigation.[15]

5. Petitioner's argument that litigation is either the purpose or the but-for cause of its creation of tax-accrual workpapers illustrates a further reason why this case is an unsuitable vehicle to resolve any purported

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[14] Petitioner did not refute that testimony. One of petitioner's witnesses testified that the workpapers would be "blank" if petitioner "did not anticipate controversy *or* litigation *or* disputes with the IRS." C.A. App. 200 (emphasis added). Thus, his testimony was not limited to litigation. Moreover, the witness further testified that the tax-accrual workpapers must include all "uncertain tax positions," *id.* at 210, not just those for which petitioner anticipated litigation.

[15] Moreover, a taxpayer's assessment of its tax positions *does* have a direct bearing on the determination of its tax liability, despite contrary claims by amici (*e.g.*, Tax Executives Inst. Br. 9). Before tax benefits like those generated by petitioner's SILO shelters may be claimed on a tax return, the Internal Revenue Code and implementing regulations require taxpayers and their advisers to assess various levels of certainty that a tax position would be sustained in litigation. See 26 U.S.C. 6662, 6694 (2006 & Supp. II 2008); Dennis J. Ventry, *Protecting Abusive Tax Avoidance*, 120 Tax Notes 857, 873-874 (2008). For example, to avoid a substantial-understatement penalty, a taxpayer must demonstrate that it reasonably believed that it had a "40 percent to 50 percent level of confidence that the position would be sustained on its merits." *Id.* at 874.

conflict about documents with both nonlitigation and litigation functions.[16] Petitioner (Pet. 18) and its amici (*e.g.*, Chamber of Commerce Br. 10) treat *all* disputes with the IRS—even an audit—as a form of "litigation" within the meaning of Rule 26(b)(3). But the fact that petitioner (like all large corporations) reasonably anticipates an annual IRS audit does not mean that it reasonably anticipates litigation over any specific uncertain tax item. Gov't Supp. C.A. Br. 14-17. The IRS audit itself is not litigation, and it is intended to be cooperative rather than adversarial. *E.g.*, *United States* v. *Frederick*, 182 F.3d 496, 502 (7th Cir. 1999), cert. denied, 528 U.S. 1154 (2000).[17]

Similarly, the fact that petitioner has previously utilized the IRS's internal dispute-resolution services (*i.e.*, the Office of Appeals) to resolve its tax liabilities in no way demonstrates that petitioner reasonably anticipates litigation over any—let alone all—of the uncertain tax items in its tax-accrual workpapers.[18] A proceeding be-

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[16] Furthermore, even if this Court were to grant certiorari and hold that petitioner's tax-accrual workpapers were prepared "in anticipation of litigation" within the meaning of Rule 26(b)(3)(A), petitioner would still be required to turn over the workpapers if the courts below found that the work-product protection had been waived by disclosure to E&Y for use in the preparation of E&Y's own workpapers. See, *e.g.*, Pet. App. 74a-78a (remanding on the waiver question); cf. p. 8, *supra* (discussing the district court's ruling that petitioner had waived other privileges).

[17] That tax-accrual workpapers assess uncertain tax positions, and not actual or expected litigation, distinguishes those documents from the litigation reserve documents discussed by petitioner (Pet. 27) and its amici (*e.g.*, Fin. Executives Int'l Br. 6-7).

[18] The panel majority placed great emphasis on petitioner's activity before the Office of Appeals, see Pet. App. 50a-51a, which the panel majority viewed as adversarial, *id.* at 58a. As the panel noted, actual

fore the Office of Appeals is both informal and nonadversarial, and it is intended to conclude administrative consideration of a taxpayer's tax liability. See, *e.g.*, *Central Valley Ag Enters.* v. *United States*, 531 F.3d 750, 758 (9th Cir. 2008).

By characterizing essentially any interaction between a taxpayer and the IRS as "litigation," petitioner and its amici fail to appreciate the dynamics of our self-assessing tax system. In an administrative tax proceeding, the "parties are not adversaries, but rather two elements of the tax regulatory regime, with one party reporting its self-assessed tax liability and the other party attempting to verify that self-assessment." Dennis J. Ventry, *Protecting Abusive Tax Avoidance*, 120 Tax Notes 857, 860 (2008). Indeed, recognizing that the IRS's interests are different from those of an ordinary litigant, FASB has explained why financial accounting standards appropriately "provide a 'roadmap' for taxing authorities." *FIN 48* ¶ B64 (explaining that one cannot "equate a taxing authority with a counterparty in a lawsuit," because "[a] counterparty in a lawsuit is acting in its own particular interest, while a taxing authority is acting in the broader public interest in regulating compliance with self-reporting income tax laws").

Petitioner and its amici also ignore the critical fact that tax assessment does not begin on a level playing field. On the contrary, the taxpayer has all the information relevant to its actual tax liability, and it may self-report its liability in a manner that minimizes its tax obligations. The IRS must then determine whether the taxpayer's self-assessment is accurate or whether some

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contested court proceedings have been very rare: in the last half century, "[petitioner] and the IRS have litigated three [tax] disputes in federal court." *Id.* at 51a.

of the many items contained in a potentially voluminous tax return (here, more than 4000 pages long) should be adjusted. The taxpayer, by contrast, already knows which issues may merit adjustment and records that analysis in its tax-accrual workpapers. By requesting those workpapers under some circumstances where the corporation has already demonstrated a willingness to engage in listed tax-shelter transactions, see p. 4, *supra*, the IRS seeks to perform its obligation to verify the self-assessment despite the information disadvantage inherent in our self-reporting tax system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-750

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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SUPPLEMENT TO CORPORATE DISCLOSURE STATEMENT

Fidelity Management & Research Company now owns 10% or more of Textron's voting stock. Fidelity Management & Research Company is a subsidiary of FMR LLC, which is not a publicly held company.

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REPLY BRIEF FOR THE PETITIONER

In its brief in opposition, the government concedes that there is a longstanding circuit conflict concerning the scope of the work-product privilege. And the government does not dispute that the scope of the privilege is an exceptionally important issue for civil litigants—nor could it, in light of the almost unprecedented number and diversity of amici who have urged this Court to resolve that issue. Instead, the government contends only that the Court should deny review because there is no circuit conflict concerning the applicability of the privilege to the specific type of documents at issue in this case. That is true, but irrelevant under the Court's familiar standards for certiorari. Instead, the salient questions are whether there is a circuit conflict concerning the legal standard for work-product protection and

whether resolution of that conflict would be outcome-dispositive here. Because the answer to each question is plainly yes, this case is an ideal vehicle for resolution of the conflict.

The government devotes the remainder of its brief to a discursive analysis on the merits. Notably, however, the government does not explicitly defend the First Circuit's novel "for use" standard. Nor does the government explain how requiring disclosure of the documents at issue here would be consistent with the policies animating the work-product privilege—and, in particular, with the need to protect an attorney's opinions and thought processes, which lie at the core of work-product protection.

If left undisturbed, the decision below will enable the IRS more aggressively to seek workpapers embodying counsel's opinions from taxpayers, as it has already declared it intends to do. The decision below will also dramatically curtail the availability of the work-product privilege in other contexts. And if the Court does not grant review here, it is far from clear when it will have the opportunity to consider the scope of the privilege in the future. Notwithstanding the government's all-out efforts to defend the outcome below, this case is an obvious candidate for further review. The petition for certiorari should therefore be granted.

A. The Decision Below Deepens A Circuit Conflict Concerning The Scope Of The Work-Product Privilege

1. The government correctly concedes that, even before the First Circuit's decision in this case, there was a longstanding circuit conflict on the scope of the work-product privilege. See Br. in Opp. 16. As explained in the petition, the majority of circuits consider whether a document was prepared or obtained "because of" the

prospect of litigation, whereas the Fifth Circuit focuses more narrowly on the "primary purpose" for which the document was prepared. See Pet. 12-16.

The government contends only that the decision below does not deepen that conflict, purportedly because the First Circuit merely reaffirmed its previous adoption of the "because of" standard. See Br. in Opp. 10, 15. As a threshold matter, if that were really the case, one might well wonder why the decision below has generated such an enormous outcry—including from the Nation's leading bar association and other groups whose interests sweep well beyond the specific factual context in which this case arises. See, *e.g.*, ABA Br. 1-4; ACC Br. 1-2; Chamber Br. 1-4.

But in any event, the government's contention lacks merit. Although the en banc First Circuit at one point reaffirmed the result of an earlier panel decision "us[ing]" the "phrase" "because of," see Pet. App. 11a, it did not otherwise so much as refer to that standard. Instead, it repeatedly reiterated the novel requirement that a document must possess a litigation-related *use* in order to be protected, see *id.* at 14a, 15a, 18a—as the government acknowledges. See Br. in Opp. 11, 16, 19, 22, 23. As the dissent below explained at length (without response from the majority), that standard is narrower than *either* the "because of" standard *or* the Fifth Circuit's "primary purpose" standard. See Pet. App. 23a-27a (opinion of Torruella, J.). Although the government attempts to reconcile the decision below with at least some decisions applying the "because of" standard, it cites no case in which any other court has specifically considered whether a document was prepared for a litigation-related *use*. See Br. in Opp. 19-20. It is understandable, then, that virtually everyone apart from the government has understood that the First Circuit

adopted a "new test" that is "more restrictive" than the test of any other circuit. John O. Everett et al., *The Reversal in 'Textron': Anatomy of a Bad Decision*, Taxes, Feb. 2010, at 85, 87; see Pet. 28-29.

2. In opposing certiorari, the government primarily contends that further review is not warranted because there is no circuit conflict concerning whether "the work-product protection * * * cover[s] a public company's tax-accrual workpapers." Br. in Opp. 13. As the Solicitor General is well aware, however, this Court grants review to resolve conflicts on questions of federal law—not on the application of federal law to particular facts. See S. Ct. R. 10. That principle is especially apposite in this context, because there are innumerable types of documents that could potentially be subject to the privilege.[1] It would be passing strange for the Court to refrain from granting review until there is a circuit conflict on the particular question whether the work-product privilege protects a spreadsheet that listed items on a company's tax return whose treatment was uncertain—any more than the Court waited for a conflict on the particular question whether the First Amendment protects a student's right to hold up a banner reading "BONG HiTS 4 JESUS" during an Olympic torch relay. See *Morse* v. *Frederick*, 551 U.S. 393, 397-400 (2007). Because the First Circuit made no effort to cabin its "for use" standard to the specific context of "tax accrual workpapers," the government does not have the prerogative to rewrite the question presented in a way that limits it to the facts.

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[1] Indeed, even describing the documents at issue here as "tax accrual workpapers" is somewhat misleading, because, as the government's own expert acknowledged, there is "no immutable definition of th[at] term" and "the documents that make up a corporation's 'tax accrual workpapers' may vary from case to case." Pet. App. 92a.

3. Instead, the key question for purposes of certiorari is whether resolution of the circuit conflict on the legal standard for work-product protection would be outcome-dispositive here. It plainly would be, and the government makes no sustained effort to suggest otherwise.

As the leading case applying the "because of" standard makes clear, the proper focus of the inquiry under that standard is whether the document at issue would not have been prepared "but for" the prospect of litigation. *United States* v. *Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998); accord, *e.g.*, *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004). Although the government at one point suggests that *Adlman* stands for the proposition that a document that was "prepared in the ordinary course of business" is not covered by the privilege, see Br. in Opp. 18, *Adlman* directly rejects that unqualified standard. See 134 F.3d at 1200 (noting that "[t]he fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3)"). Instead, it makes clear that the key inquiry is whether the document *would have been prepared* "irrespective of the expected litigation"—*i.e.*, "but for" the prospect of litigation. *Id.* at 1204; see *id.* at 1195.

Applying that test, both the district court and the court of appeals panel in this case correctly determined that the documents at issue would be protected by the privilege. See Pet. App. 55a-74a, 105a-110a. That conclusion ineluctably follows from the district court's finding that, absent the prospect of litigation with the IRS, the documents would not have been prepared at all. See *id.* at 108a. It is presumably for that reason that, in ruling for the government, the en banc court of appeals abandoned the "because of" standard and devised its novel, more stringent "for use" standard. See *id.* at 14a.

Because there can be no real debate that the choice of the appropriate legal standard would be outcome-dispositive here, this case is an optimal vehicle for resolution of the circuit conflict on the privilege's scope.

B. The Court Of Appeals' Decision Is Erroneous

The government devotes the remainder of its brief to various arguments on the merits. We make just a few points in response here, and leave fuller responses to subsequent merits briefing if certiorari is granted.

1. As a preliminary matter, it is conspicuous that the government does not explicitly defend the First Circuit's "for use" standard. The government similarly did not advocate the "for use" standard below—and, in fact, specifically abjured it. See C.A. En Banc Tr. 21 (June 2, 2009). The government's reticence is not surprising. For the reasons stated in the petition, the "for use" standard is patently flawed. See Pet. 20-24. And such a narrow interpretation of the work-product privilege would hardly be in the government's institutional interest, because the government concededly asserts the work-product privilege in litigation at least as often as it seeks to pierce it. See C.A. Panel Tr. 20 (Sept. 5, 2008).

2. The government instead offers three possible alternative standards for work-product protection that, in its view, would support affirmance. All of those alternatives are unavailing.

a. The government suggests (Br. in Opp. 15-16) that the work-product privilege protects any document that was prepared for a litigation-related purpose, even if it was prepared for another purpose as well. That test has at least some basis in cases applying the "because of" standard, see Pet. 18—although the better (and more administrable) understanding of the "because of" standard is that it focuses not on the subjective motive of the

preparer but rather on the objective causal connection between the document's preparation and the prospect of litigation. See p. 5, *supra*. But petitioner would prevail even under that test, because it presented uncontroverted testimony that the documents at issue were prepared, *inter alia*, to guide it in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200. Although the en banc First Circuit cast aspersions on that testimony, see Pet. App. 14a, it did not determine that the testimony was not credible; instead, it ultimately concluded that the testimony was *irrelevant* under its "for use" standard. See *id.* at 11a-12a, 18a-19a. Under either a "but for" test or a "dual purpose" test, therefore, petitioner would plainly prevail here.

b. Perhaps for that reason, the government proposes two other alternative standards, both based on the language of the advisory committee note to Rule 26(b)(3). Those alternatives—which the government concedes did not serve as the basis for the decision below, see Br. in Opp. 16 n.10—also lack merit.

i. The government contends (Br. in Opp. 12-13, 18-19) that the work-product privilege does not protect any document that was "prepared in the ordinary course of business." Although some courts have noted in passing that particular documents were prepared in the ordinary course of business, see *id.* at 18-19, no court has adopted that as the governing legal standard, and for good reason. Such a standard would ignore the reality that many, if not most, documents "prepared in anticipation of litigation"—such as a memorandum prepared by in-house counsel to inform a merger partner of the potential for antitrust litigation, or an internal memorandum prepared by outside counsel to assess a particular litigation risk—could also be said to have been "prepared in the

ordinary course of business." See ACC Br. 8-15. As a result, such a standard would create an atextual exception that would threaten to swallow whole the operative provision of Rule 26(b)(3). See, *e.g.*, *United States* v. *Roxworthy*, 457 F.3d 590, 598-599 (6th Cir. 2006); *Adlman*, 134 F.3d at 1198-1199. And it would eviscerate the policies that this Court articulated in adopting the work-product privilege in *Hickman* v. *Taylor*, 329 U.S. 495 (1947)—a decision, remarkably, that the government scarcely even cites—because it would strip protection from documents embodying an attorney's "thoughts" and "mental impressions," which lie at the heart of the privilege. *Id.* at 511, 512.

ii. The government also asserts (Br. in Opp. 21, 24-25) that the work-product privilege does not protect any document that was prepared for the purpose of complying with a statutory or regulatory requirement. But the critical point is that, while the documents at issue here were prepared for the purpose, *inter alia*, of assisting petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities, petitioner was not *required* to generate those documents. Although the government contends that legal or auditing requirements "mandate" that "tax-accrual workpapers" be created, *id.* at 21, it cites no authority for the proposition that petitioner was obligated to create *the documents at issue here*. To the contrary, petitioner could have complied with any applicable obligations simply by conveying all of the same information to its auditor orally or in less detail. See *id.* at 2-3. And one can safely predict that companies more broadly will be deterred from reducing information to writing if the court of appeals' decision is left undisturbed, with the resulting chilling effect and

"inefficiency" of which this Court has warned. See *Hickman*, 329 U.S. at 511, 514.[2]

C. The Question Presented Is An Exceptionally Important And Recurring One That Merits The Court's Review In This Case

Finally, the government does not dispute that the scope of the privilege is an exceptionally important issue for civil litigants. That issue warrants review here.

1. To begin with, the factual context in which this case arises is important in its own right. Citing various authorities from the 1980s, the government suggests that review is not warranted because the IRS seeks to obtain "tax-accrual workpapers" "only in unusual circumstances." Br. in Opp. 4. In 2002, however, the IRS adopted a more aggressive policy giving it the discretion to seek all of a taxpayer's workpapers under specified circumstances. See I.R.S. Announcement 2002-63, 2002-2 C.B. 72. And since the decision in this case, the IRS has declared that it will pursue such workpapers even more aggressively in the future. See Pet. 26. Notwith-

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[2] As an aside, the government suggests (Br. in Opp. 26-29) that, for purposes of Rule 26(b)(3), only litigation in federal court qualifies as "litigation," and antecedent IRS administrative proceedings do not. Petitioner, however, presented evidence below that there was a reasonable prospect of federal-court litigation. See Pet. 18; Pet. App. 91a, 109a. And in any event, there is no basis for excluding from the scope of Rule 26(b)(3) either administrative proceedings more generally, see, *e.g.*, Restatement (Third) of the Law Governing Lawyers § 87, cmt. h (2000), or IRS administrative proceedings specifically, see, *e.g.*, *Roxworthy*, 457 F.3d at 600; *Hodges, Grant & Kaufmann* v. *IRS*, 768 F.2d 719, 722 (5th Cir. 1985). The government's assertion that IRS administrative proceedings are "cooperative rather than adversarial" (Br. in Opp. 27) would come as a surprise to anyone who has had dealings with the IRS.

standing the government's protestations of restraint, therefore, one can be reasonably confident that, if the decision below is allowed to stand, the IRS will be emboldened to seek workpapers as "roadmaps" to taxpayers' thinking in preparing their tax returns—as the IRS concededly did here. See Pet. 5-6.[3]

The government does not dispute that the First Circuit's standard will also have consequences in a variety of other contexts—nor could it, given its repeated concessions to that effect at oral argument below. See C.A. En Banc Tr. 4-5, 16, 19 (June 2, 2009). The petition sets out numerous examples of those contexts, see Pet. 27-28, and the various amicus briefs set out still others, see, *e.g.*, Chamber Br. 14-21. The government also does not dispute that the First Circuit's decision is already having a chilling effect on practitioners, who are taking steps to avoid the disclosure of litigation risk assessments and other documents previously thought to be privileged. See Pet. 29; PLAC Br. 17-19. In this area of the law, perception matters, because lawyers will naturally tailor their advice in accordance with what they believe to be the applicable legal standard rather than risking disclosure. See Reed Smith Br. 5-6, 13; cf. *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) (noting that "[a]n uncertain privilege * * * is little better than no privilege at all").

2. Much has changed in the legal profession in the more than sixty years since *Hickman*. See ABA Br. 7-9. This Court, however, has not directly addressed the

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[3] Ironically, the government justifies its pursuit of workpapers by reference to the "complexity" of corporate tax returns. See, *e.g.*, Br. in Opp. 4 n.3, 29-30. Needless to say, any "complexity" is a problem of the government's own making, not petitioner's.

scope of the privilege in that time—and, because of the difficulty in obtaining interlocutory review on privilege issues, it is far from clear when it will next have the opportunity to do so. Contrary to the government's suggestion (Br. in Opp. 17 n.11), the Court recently *limited* the availability of interlocutory review for privilege rulings. See *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 609 (2009). And although the government contends that "litigants regularly seek review in this Court," Br. in Opp. 17 n.11, the only petition for certiorari it cites presenting the same question was filed almost ten years ago, and we are unaware of any since then.

As the outpouring of amicus interest confirms, this is precisely the sort of practically significant case that the Court should hear. And there is good reason why the Court cannot afford to wait for another case presenting the same issue. In short, "[t]he time is ripe for [the] Court to intervene," Pet. App. 45a (Torruella, J., dissenting), and resolve the pervasive uncertainty concerning the scope of a vitally important privilege.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioners.[1] The ABA requests that the petition be granted so that attorneys can have the guidance of the Court on the scope of the work product privilege in light of legal and practical issues that have arisen since the Court last delineated this doctrine.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

Throughout its history, the ABA has taken a leading role in developing standards governing the preservation of client confidences. In 1908, the ABA adopted its CANONS OF PROFESSIONAL ETHICS, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences," which duty "outlasts the lawyer's employment." CANONS OF PROF'L ETHICS Canon 37 (1908, last am. 1963). The ABA further encouraged recognition of the attorney work product privilege in its *amicus* brief filed in *Hickman v. Taylor*, 329 U.S. 495 (1947).[3] In *Hickman*, the Court recognized the privilege, concluding that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510.

The ABA also advocated in favor of the work product privilege in its *amicus* brief in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).[4] In *Swidler*, one of the questions presented was whether, even after a client's death, an attorney's notes of an initial client consultation were work product protected as the attorney's "mental impressions." *Id.* at 403. In its brief, the ABA submitted that the privilege should apply even at this early stage, to enable counsel to elicit and protect pertinent client information that would shape the goals and strategies to be pursued in the

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[3] The Brief of the American Bar Association as *Amicus Curiae* in *Hickman* may be found at 1946 WL 62839.

[4] Brief of the American Bar Association as *Amicus Curiae* in *Swidler & Berlin* may be found at 1998 WL 208818.

matter. ABA *Amicus Curiae* Brief in *Swidler & Berlin*, 1998 WL 208818 at *27 (citing Fred Lane, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03 at 3 (3d ed. 1997)). The Court, however, held that the documents were protected by the attorney-client privilege and did not reach the work product issue. *Swidler*, 524 U.S. at 403 n.1.

More recently, to further the common goals of the attorney-client and work product privileges, the ABA established a task force to study and educate others on the role of both the attorney-client and the work product privileges. In 2005, after consideration of a report from this task force, the ABA House of Delegates adopted as ABA policy the task force's findings that, *inter alia*, the preservation of the attorney-client and work product doctrines are essential to maintaining the confidential relationship between client and attorney that is required to encourage clients "to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice, and (4) promote the proper and efficient functioning of the American adversary system of justice." ABA *2005 Report with Recommendation #111* (Policy adopted Aug. 2005) *available at* www.abanet.org/leadership/2005/annual/dailyjournal/111.doc.[5]

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[5] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated

(footnote continued on next page)

The ABA recognizes that the distinction between attorney work product and discoverable materials generated in the ordinary course of business remains – to use the words of the *Hickman* Court – "one of the most hazy frontiers of the discovery process." *Hickman,* 329 U.S. at 513-14. The legal and practical issues that have arisen since *Hickman* was decided have rendered this distinction even more hazy, particularly with respect to dual purpose documents prepared by attorneys in connection with regulatory requirements and evolving business practices. Adding to this uncertainty is the emergence of the split among the circuits on the standards for applying the work product privilege. This uncertain environment adversely affects the ability of attorneys to provide their clients with responsible legal counsel. The ABA, therefore, supports the present petition for writ of certiorari because of the interest of its members in having a uniform and effective rule for determining the work product privilege.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted to resolve the conflict in the lower courts on the scope of the attorney work product privilege to documents that are prepared both in the ordinary course of business and in anticipation of litigation.

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organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html.

The ABA asserts that the privilege should not be limited to materials prepared solely "for use in litigation," Petition for Writ of Certiorari at 21a, United States v. Textron, No. 09-750 (Dec. 24, 2009), but should also encompass those that are prepared to serve both a business and a litigation purpose, whether or not a claim is ever threatened or filed.

Dual purpose work product documents have resulted from a number of legal and practical considerations that have not been considered by the Court in its previous work product rulings. These include the investigations and assessments required by the Sarbanes-Oxley Act of 2002 and "FIN 48," a financial accounting standard adopted in 2006. Further, today's businesses, and even the IRS, rely increasingly on counsel to evaluate proposed activities or practices and assess legal ramifications, including litigation risks, before making business decisions. Clients also rely on their counsel to conduct investigations of occurrences, recognizing that litigation may arise but often having the goal of avoiding litigation while ensuring compliance with laws and corporate policies. Although clients' needs for attorney investigation and counsel is greater than ever, the current circuit split has created an uncertain environment for attorneys practicing in a variety of contexts.

The scope of the attorney work product privilege now depends on the jurisdiction in which a dispute arises or discovery is sought. To protect confidential information, clients who conduct multi-jurisdictional activities are motivated to adopt procedures consistent with the narrowest interpretation of the privilege, with the result that an overly restrictive

approach to dual purpose documents may threaten the free flow of confidential information from client to attorney necessary for the attorney to provide effective counseling and advocacy. Moreover, the circuit split has placed attorneys in the untenable position of deciding whether to create work product when it may be privileged in one jurisdiction but not in another.

Accordingly, the ABA supports the present petition for a writ of certiorari because the uncertainties resulting from the circuit split are undermining the goals of the work product privilege and, indeed, the ability of many attorneys to do their jobs effectively.

REASON FOR GRANTING THE WRIT

The different standards adopted by the circuit courts for determining whether materials are protected leave attorneys and their clients uncertain as to the scope of the work product privilege. As this Court has observed, however, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

The ABA submits, therefore, that the Court should grant the petition to clarify that the scope of the attorney work product privilege is not limited to materials prepared solely "for use in litigation," Pet. App. at 21a, but also encompasses materials that are prepared to serve both a litigation and a business purpose, whether or not a claim is ever threatened or filed.

A. THE CIRCUIT CONFLICT HAS CREATED UNCERTAINTY OVER THE APPLICABILITY OF THE ATTORNEY WORK PRODUCT PRIVILEGE TO DUAL PURPOSE DOCUMENTS.

1. Often there is no clear distinction between documents prepared in anticipation of litigation and in the ordinary course of business.

Fed. R. Civ. P. 26(b)(3) protects from discovery materials prepared "in anticipation of litigation." As the *Hickman* Court observed, however, the distinction between discoverable business documents and privileged attorney work product can be hazy. 329 U.S. at 513-14. Today, there is more uncertainty than ever due to the increasing number of dual purpose documents that are created both in anticipation of litigation and in the ordinary course of business.

For example, in today's business climate, clients often rely on their attorneys to evaluate proposed activities and assess litigation risks before they make business decisions. Clients also rely on their counsel to conduct confidential investigations of occurrences and incidents, including employee allegations of discrimination or harassment, recognizing that litigation may arise but often with the aim of avoiding litigation while ensuring compliance with employment and other laws and corporation policies.

Today's business environment also includes the requirements of the Sarbanes-Oxley Act of 2002, under which audit committees of public companies

must establish procedures for receiving and handling complaints "regarding accounting, internal controls or auditing matters" and confidential submissions by employees. 15 U.S.C. § 78j-1 (2009). These audit committees are frequently also charged with investigating whistleblower complaints. In performing these responsibilities, they typically rely on their attorneys to conduct internal investigations, and their attorneys create work product outlining the scope of potential claims and possible legal strategies before litigation is threatened or filed. *See* Memorandum from Corporate Counsel Consortium, The Auditor's Need For Its Client's Detailed Information vs. The Clients' Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions 5 (2004), *available at* http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16222.

In addition, the assessment of litigation prospects has become commonplace in the context of audits and, in particular, possible tax liability, as the present case has shown. Under FASB Interpretation No. 48 ("FIN 48"), as adopted by the Financial Accounting Standards Board in 2006, public companies must determine whether it is more likely than not that a tax position will be sustained upon examination by or litigation with the IRS. FASB, *FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes* (June 2006) *available at* http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175818746949&blobheader=application%2Fpdf. This determination entails an assessment of the strength

of the company's position in possible litigation. *See* Andrew Golodny, *Lawyers Versus Auditors: Disclosure to Auditors and Potential Waiver of Work-Product Privilege in* United States v. Textron, 61 TAX LAW. 621, 631 (2008); Michelle M. Henkel, Textron: *Its Impact on the Viability of the Work Product Privilege*, 2009 TAX MGMT. MEMORANDUM 515, 516 n.18.

The overlapping functions of these documents has created uncertainty as to whether they fall outside the scope of the plain language of Rule 23(b)(3) simply because they were prepared not only in anticipation of litigation but also to serve a business purpose.

2. There is a circuit split on how Rule 26(b)(3) should be applied to dual purpose documents.

In contrast to the outcome in the First Circuit's *Textron* decision, a study created by an attorney that assesses the likely results of an expected litigation is eligible for work product protection in the Second Circuit, even where the primary or ultimate purpose for making the study is to assess the desirability of a business transaction. *U.S. v. Adlman,* 134 F.3d 1194, 1195 (2d Cir. 1998). As noted by the Second Circuit, *id.* at 1200:

> If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses

cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Moreover, in *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126 (D.C. Cir. 1987), the IRS relied on its counsel to analyze the litigation potential of a proposed system of statistical sampling for its corporate audit program for large accounts. After the IRS attorneys analyzed possible legal challenges, defenses and likely outcomes, the IRS concluded that the legal risks were reasonable and instituted the program. When litigation ensued, the D.C. Circuit concluded, "[Plaintiff] is seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case against the program. This is exactly the type of discovery the Court refused to permit in *Hickman*[]." *Id.* at 127. In a footnote, the D.C. Circuit noted, "The hardship the Court was concerned about in *Hickman* was an attorney's inability to obtain otherwise unavailable factual information, and not the inability to obtain an adversary's legal assessment of what the case might turn on." *Id.* at 128 n.4.

In the First Circuit, however, a lawyer's assessment of litigation is not protected by the work product privilege if it also satisfies a business objective. As a result, in the First Circuit and in other courts that follow its rule, a client that prudently relies upon counsel before making a business decision may be penalized by being forced to give its adversaries a roadmap of the strengths and weaknesses of its case if litigation does in fact occur. *See* Pet. App. at 21a. This circuit split has

exacerbated the uncertainty surrounding the application of the work product privilege to dual purpose documents. And, as shown below, this uncertainty also undermines the ability of lawyers to do their jobs effectively.

B. THE UNCERTAINTY REGARDING THE SCOPE OF THE ATTORNEY WORK PRODUCT PRIVILEGE UNDERMINES THE ABILITY OF ATTORNEYS TO COUNSEL THEIR CLIENTS EFFECTIVELY.

With the advent of Sarbanes-Oxley and enhanced auditing standards, clients' needs for attorney counsel, investigation, and analysis is greater than ever before. Yet both in-house counsel and attorneys in private practice have expressed wariness "of providing complete assessments of future legal trouble in a variety of areas, from product-liability litigation to patent disputes." Amir Efrati, *Rule in Tax-Auditing Case Puts Corporations on Edge*, WALL ST. J., Aug. 20, 2009. Other commentators have noted concern that adversaries "in any sort of litigation may seek to discover the opposing party's analysis of the business risks of the litigation, including the amount set aside in a litigation reserve fund." Nancy T. Bowen, William S. Lee & Robert C. Morris, *Newly Minted 'For Use In Possible Litigation' Test of* 'Textron' *May Have Far-Reaching Implications for Companies*, 78 U.S. L. Wk. 2199 (Oct. 13, 2009).

If clients are penalized by having to disclose their attorneys' assessments of litigation risks on the ground that this work product was created for a business purpose as well as "in anticipation of

litigation," they will become guarded in deciding how they will rely upon their lawyers. This result inevitably would "threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392 (concerning the attorney-client privilege). *See also United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (the "valuable service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into ... informants").[6]

Clearly, the current circuit conflict has created an uncertain environment for attorneys practicing in a variety of business contexts. Further, because the scope of the attorney work product privilege depends on the jurisdiction in which a dispute arises or discovery is sought, attorneys with clients who conduct multi-jurisdictional activities may need to advise those clients to adopt the narrowest interpretation of the privilege that has been established in any jurisdiction in which they may be

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[6] *See also* ABA SECTION ON ANTITRUST LAW, COMMENTS OF THE ABA'S SECTION OF ANTITRUST LAW ON THE PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES FOR ORGANIZATIONS 5-7 (2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/03-05/ussg-com-05.pdf (need to preserve work product privilege to allow lawyers to assist clients in complying with the law); Thomas Wilson, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. REV. 587, 587 (narrow construction of work product privilege "penalizes businesses that prudently investigate after incidents which may cause future liability").

subject to discovery or haled into court. Meanwhile, the attorneys themselves may be in the untenable position of deciding whether to create work product when it may be privileged in one jurisdiction but not in another.

This and other consequences of the circuit split significantly affect the ability of attorneys to provide their clients with full, effective legal counsel and the informed guidance that may be necessary to enable them to comply with their legal responsibilities in today's business environment. As Justice Jackson stated in his concurrence in *Hickman*:

> The primary effect of the practice advocated here [of permitting discovery of attorney work product] would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensible parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice . . . secondarily but certainly.

329 U.S. at 514-15 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the petition for writ of certiorari to the Court of Appeals for the First Circuit in *Textron v. United States* be granted.

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TEXTRON INC. AND SUBSIDIARIES,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the work-product doctrine recognized in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation.

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IN THE

Supreme Court of the United States

No. 09-750

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICUS CURIAE ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Association of Corporate Counsel is a bar association of over 25,000 "in-house" attorneys who practice in the legal departments of more than 10,000 public, private, and nonprofit corporations worldwide.[1] The As-

[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

sociation is deeply interested in this case because it has a strong interest in ensuring that its members are able to provide their clients frank and thorough legal advice; to be able to do so, attorneys must not be chilled from thoroughly analyzing the legal problems faced by their clients. The Association offers the unique perspective of in-house lawyers, who provide corporate legal counseling to their clients on a daily basis across every industry and in-house practice setting.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for certiorari should be granted because the First Circuit's decision is deeply flawed on two grounds:

First, it derails the sensible development of the work-product doctrine. This Court, the D.C. Circuit, the Second Circuit, and other courts have recognized that modern corporations constantly rely on their attorneys for preventive legal advice—that is, an evaluation of the litigation and regulatory risks of business decisions *before* they are undertaken. To provide this advice, corporate attorneys must be able to collect facts and analyze law without the fear that their work will be later discoverable by adverse parties. These courts have thus reasonably defined the work-product doctrine to cover the legal and factual analysis that supports preventive legal advice. The First Circuit's contrary reasoning is inconsistent with the realities of the modern business world.

Second, the First Circuit's decision undermines important efforts by in-house and outside counsel to promote preventive compliance and important financial accounting and disclosure functions necessary to assure corporate responsibility, accountability, and transpar-

ency. Modern corporations are faced with countless legal risks and pitfalls. Companies rely on their lawyers both to help them comply with the law and to contribute analysis and understanding of the implications and scope of legal risk, so that companies can take those implications into account in the course of their daily business decision-making and when assessing the companies' legal, financial, and disclosure obligations.

To be effective, legal risk assessment must be based on thorough analysis. The work-product doctrine gives attorneys the confidence to be as thorough and candid as necessary. The First Circuit, however, discounted the importance of the analysis that is essential to delivering preventive legal advice and promoting accurate preparation and planning, and therefore deemed that analysis unworthy of the protections of the work-product doctrine. That decision will chill corporate lawyers from being as meticulous as they need to be, and will deprive managers of the detailed legal assessment that they need to make good decisions upon which countless other stakeholders will rely. The decision will therefore undermine efforts at improving corporate compliance, transparency, and accountability.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE WELL-ACCEPTED PRINCIPLE THAT THE WORK-PRODUCT DOCTRINE APPLIES TO ANALYSIS THAT IS NECESSARY TO DELIVERING PREVENTIVE LEGAL ADVICE

This Court and other courts of appeals have properly recognized that the work-product doctrine should not be confined to the narrow context where it was first recognized (*i.e.*, materials prepared for trial) but should also apply when lawyers analyze the litigation risks of

proposed business transactions. Because the First Circuit rejects that reasoning, this Court's review is warranted.

A. This Court And Other Courts Of Appeals Have Extended The Work-Product Doctrine To Analysis Of The Litigation Risks Of Business Transactions

The scope of work-product protection has evolved significantly since the Court first articulated it in *Hickman* v. *Taylor*, 329 U.S. 495 (1947)—as has the legal system. In the 1940s, the volume of civil litigation was much less than it is now, and criminal prosecution of corporations was rare. Many corporations were therefore fundamentally reactive in their approach to litigation, hiring outside counsel to resolve legal problems after they had arisen, rather than seeking preventive advice to avoid problems before they arose or assess the litigation risks of business decisions. *See* Liggio, Sr., *A Look at the Role of Corporate Counsel*, 44 Ariz. L. Rev. 621, 623 (2002). The work-product doctrine announced in *Hickman* understandably reflected those circumstances, and that case involved materials created "in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497.

Hickman itself recognized, however, that work-product protections would not be static. Because the work-product doctrine is an instrument of "public policy," driven by "the interests of the clients," 329 U.S. at 510, 511, it must reflect the "background of custom and practice," *id.* at 518 (Jackson, J., concurring). And in the decades following *Hickman*, there was a dramatic change in the "custom and practice" of how corporations managed their litigation risks. Beginning in the 1960s, there was a burst of civil litigation, much of it

involving corporations. Liggio, *supra*, at 624. Simultaneously, Congress created several administrative agencies, each with its own enabling statutes, implementing regulations, and enforcement authority. *Id.* The SEC, the IRS, and the Justice Department also significantly expanded their investigation of and enforcement against questionable actions by corporations. *See* Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 1011 (2007).

In response, corporations necessarily began to take a more proactive approach to litigation through preventive counseling. Before initiating any important transaction, corporations now ask their attorneys for advice about the legal risks involved. Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 283 (1985). Counsel can provide such advice only after thoroughly investigating the facts and candidly analyzing the legal issues. This process enables companies to structure their business decisions to avoid future litigation by focusing on how to avoid legal problems (or minimize risk) in the first place.

The Court acknowledged this change by extending the work-product doctrine to the legal and factual analysis that serves as the basis for preventive legal advice. In *Upjohn Co.* v. *United States*, the Court recognized the need to protect the confidentiality of notes and memoranda prepared by Upjohn's corporate counsel during an internal investigation of questionable payments made by foreign subsidiaries. 449 U.S. 383, 401 (1981). As the Court noted, these materials were intended to "supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, *and potential litigation in each of these areas*." *Id.* at 394

(emphasis added). The Court appreciated that corporations must plan their conduct around legal risks: "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Id.* at 392 (internal quotation marks omitted). The Court therefore granted protection to "the valuable efforts of corporate counsel" that would lead to sound preventive advice and "ensure their client's compliance with the law." *Id.*

The courts of appeals—especially the Second and D.C. Circuits—followed this Court's lead. The Second Circuit held that the work-product doctrine covers documents that are "created because of the prospect of litigation, analyzing the likely outcome of that litigation." *United States* v. *Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). As it explained, corporations will often ask counsel for legal memoranda on "whether to undertake [a] transaction and, if so, how to proceed with the transaction." *Id.* at 1199. The work done to prepare such advice falls "squarely" within work-product protections because it "candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." *Id.* at 1200; *see also United States* v. *Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (adopting *Adlman*).

Likewise, the D.C. Circuit held that the work-product doctrine applies to analysis intended "to protect the client from future litigation about a particular transaction." *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998). A "contrary ruling" would "undermine" a "particularly critical stage of a legal representation" because "[i]t is often prior to the emergence of specific claims that lawyers are best equipped either to help cli-

ents avoid litigation or to strengthen available defenses should litigation occur." *Id.* at 886.

B. The First Circuit's Decision In This Case Departs From The Predominant Understanding Of The Work-Product Doctrine

The courts that have extended work-product protections to the analysis supporting preventive legal advice have correctly understood that *Hickman* was a fundamentally pragmatic decision: it rested on "public policy" concerns, and the scope of the privilege it recognized was bound to change as the legal system changed. In stark contrast, the First Circuit's understanding of *Hickman* adopted in the decision below is wooden and formalistic. It does not take account of the evolving nature of legal work-product in modern corporate counseling and in assessing legal risk as that risk in turn affects the company's financial posture.

The decision below went astray by focusing on Hickman's *facts* rather than its *reasoning*. The First Circuit believed that *Hickman* was about "the materials that lawyers typically prepare for the purpose of litigating cases," such as "memoranda recording witness interviews . . . , draft briefs, [and] outlines of cross-examination." Pet. App. 10a. Because the First Circuit framed *Hickman* so narrowly, it viewed the work-product doctrine as protecting only the "lawyer who tries cases." *Id.* at 15a, 17a. Under that cramped view, it concluded that the doctrine applies only to "materials prepared for use in litigation." *Id.* at 15a. The court found irrelevant the ubiquitous modern corporate practice of preventive legal analysis, because (the court believed) an "experienced litigator" would never consider such materials deserving of privilege. *See id.* at 17a, 19a.

Whatever might have been true in the 1940s, the First Circuit's view is disconnected from the realities of the modern legal system and lawyers' increasingly important role in advising companies regarding the legal risks and complexities of every aspect of corporate decision-making, ranging from daily operations to periodic financial disclosure to major transactions. As this Court and other courts of appeals have rightly concluded, the animating rationale of *Hickman* is no longer strictly limited to trial-preparation materials. Today, litigation is an ever-present fact of life permeating almost every business decision made in corporations, and it would be rash for any company not to consider litigation risks in its business planning. If work-product protections are to be adequate to serve important concerns of "public policy" and the "interests of the clients," *Hickman*, 329 U.S. at 510, 511, then they should extend to analysis of the litigation risks of planned business decisions. Because the First Circuit's flawed application of *Hickman* is so deeply at odds with the approach taken by other courts, this Court's review is warranted.

II. THE FIRST CIRCUIT'S DECISION THREATENS CORPORATE GOVERNANCE EFFORTS

The First Circuit's legal error, if allowed to stand, will lead to a significant problem of public policy: the decision will undermine diligent efforts by those seeking to promote better corporate responsibility, transparency, and accountability. Corporations in this country of every kind vitally depend on preventive legal advice and accurate risk assessment. By seeking and obtaining advice on the risks of litigation or corporate liability exposure, corporations can police themselves, comply with the law, and avoid (or at least prepare to defend against) litigation. By providing corporate lea-

ders with accurate and candid evaluations of litigation risk, corporate counsel can assist corporations in improving their performance in innumerable ways, such as setting accurate litigation reserves, understanding and complying with disclosure obligations, and assessing the implications of possible tax positions. In short, preventive legal advice is essential to fostering good corporate behavior and responsible financial decisions and reporting.

But corporations will not receive effective and candid preventive legal advice, nor will they be able to accurately assess the risks of their business decisions, unless corporate managers can be assured that their attorneys can undertake thorough legal analysis without worry that their own work product will be used against the company's interests in the future. Herein lies the fundamental flaw in the First Circuit's reasoning: it fails to recognize that, if lawyers are to serve their clients effectively, both the clients and the lawyers must not have reason to fear that the lawyers' analysis will become "Exhibit A" for their potential adversaries. By raising that prospect, the First Circuit's decision will discourage clients from seeking out and including corporate lawyers in their daily work and will deter corporate lawyers from preparing and providing thorough preventive legal advice, all of which will leave companies less informed than they should be about the legal risks of business decisions. The inevitable result will be a reduction in effective self-policing and a rise in mismanaged transactions, with litigation inevitably following. No attorney should be considering how to limit his legal advice to counter this dilemma, and no company (nor its stakeholders) should suffer the consequences of this chilled relationship—especially since

improved corporate governance is one of the central public-policy objectives of the day.[2]

A. The First Circuit Ignored the Necessity of Preventive Legal Advice In Today's Corporate World

The First Circuit attached no importance to preventive legal advice. Such advice, however, is indispensable in the modern business world.

Unlike individuals, corporations are constantly exposed to a wide range of litigation and regulatory risk. Even operational decisions made on a daily basis by small companies—*e.g.*, marketing, sales or purchases, employment policies, workplace-safety—could carry entity-threatening potential legal risks if blithely taken. And complex decisions taken by the largest companies—*e.g.*, mergers and acquisitions, stock or bond issuances, regulatory compliance (including tax treatment advice), entry into foreign markets—come with immense legal complications. When these transactions are mishandled, companies can face government investigations, civil and criminal penalties, and private lawsuits. These complexities are often amplified by legal

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[2] The attorney-client privilege is not sufficient to protect preventive legal analysis. Although the attorney-client privilege and the work-product doctrine sometimes overlap, the two are not substitutes. The work-product doctrine "actually differs dramatically from the [attorney-client] privilege in nearly every respect." 2 Spahn, *The Work Product Doctrine: A Practitioner's Guide* § 8.1, at 423 (2007). The attorney-client privilege protects *communications* between attorneys and clients, but the legal and factual analysis that supports preventive advice will often derive from a lawyer's own thinking (and not his communications). The attorney-client privilege is thus of limited benefit in this context.

uncertainty, because it may be unclear whether a certain course is legal or questionable, whether an action taken will raise new legal concerns *post hoc*, or whether subsequent developments will unfold and affect the wisdom of the approach taken in unanticipated ways. As this Court has noted, for instance, antitrust violations are "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 440-441 (1978).

Because corporate managers act against this gray background, they must anticipate and plan to avoid litigation risks for practically every important decision they make. A deal might implicate antitrust or securities laws, a new technology might involve copyright or patent issues, an employment policy could have unintended impacts on a protected class, a new product might lead to tort liability—all of which could lead to costly litigation. *See In re Sealed Case*, 146 F.3d at 886. To account for such contingencies, it is essential for corporate managers to understand all the risks, so that they can make a well-informed decision to stop, continue, or alter a planned transaction.

The public-policy benefits of preventive legal advice and accurate financial risk assessment are substantial. They help companies follow the law, serve the stakeholders who rely on the accuracy of companies' financial reporting when making their own decisions in reliance on the company's business integrity, and promote accountability and responsibility in corporate governance. As scholars have generally observed, "legal advice provided when individuals are deciding how to act will tend to be socially beneficial" because it leads them "to behave desirably." Kaplow & Shavell, *Legal Advice About Information to Present in Litigation*,

102 Harv. L. Rev. 565, 597 (1989). This will be especially true in the corporate context, since preventive legal advice will help companies to defuse potentially serious legal consequences. Such self-policing will surely pay broad dividends across the system: the company will avoid (or be better enabled to address) litigation; its shareholders will not suffer a diminution in the value of their investments; the government will not have to launch investigations or focus on expensive remedial actions; and employees and the general public will be spared the devastating and far-reaching impact of more corporate scandals.

B. The First Circuit Failed To Understand That The Work-Product Doctrine Is Crucial To Fostering Effective Preventive Advice

To provide effective preventive legal advice, corporate lawyers must be able to undertake investigations that uncover all the facts and to conduct analysis that diagnoses all the legal risks. Contrary to the First Circuit's reasoning, the protection of that process is the proper province of the work-product doctrine.

As this Court has observed, to provide effective service to a client, a lawyer must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510-511. Hence, the work-product protections recognized by this Court guard against the "[i]nefficiency, unfairness and sharp practices" that would otherwise "inevitably develop in the giving of legal advice." *Id.* at 511.

Companies that employ or retain lawyers to advise them about the litigation risks of planned business decisions need work-product protections if their lawyers'

advice is to be thorough and candid. Indeed, the need may be even greater in that context than in the trial setting because preventive lawyering presents unique challenges. There is usually no lawsuit to frame the preventive inquiry and no discovery to guide the factual investigation. Instead, when a company asks its attorney for preventive advice, the lawyer must piece together the necessary facts, laws, and issues from scratch, often under severe time and business pressure. To do this well, the lawyer needs complete confidence that he can prepare thorough analysis without jeopardizing his client's interests—in particular, he needs to be sure that his work will not later end up in the hands of an adverse party who could potentially use the analysis against his client. On the other hand, when a lawyer fears that his work product will not be protected, he will "not likely risk" being entirely candid and comprehensive, "thus severely limiting [his] ability to advise clients effectively." *In re Sealed Case*, 146 F.3d at 886.

These protections are particularly important to the work carried out by in-house attorneys, who are obligated as corporate gatekeepers to provide preventive legal advice. In-house attorneys are particularly well positioned to help their companies comply with the law. They are "intimately familiar" with the company's operations. Kim, *Dual Identities & Dueling Obligations*, 68 Tenn. L. Rev. 179, 199-200 (2001). Unlike outside counsel, who often are hired only after a crisis erupts, in-house lawyers tend to be involved in every stage of a company's decision-making process, as well as a wider range of transactions, many of which outside counsel never see or might not understand as fully because they are not integrated in the company's daily processes. *See* Duggin, *supra*, at 1006-1019. Equally important, in-house attorneys usually have a trusted rela-

tionship with corporate managers inside the company and a regular place at the table when business decisions are being made. They have access not only to information transmitted through formal channels (such as board meetings) but also to "informal, back-channel information that flows around the company water cooler." Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1019 (1997). Thus, when they provide preventive legal advice, in-house attorneys can bring to bear their full institutional expertise and knowledge. But if their work product will be discoverable, such thoroughness will not be in the company's best interests in terms of limiting risk or liability.

C. The First Circuit's Decision Will Chill The Lawyer's Analytical Process, To The Client's Detriment

In the D.C. and Second Circuits, when corporate attorneys prepare preventive legal advice, they can be sure that their work product will not be discoverable. So unfettered, they can conduct comprehensive analysis, knowing that candid assessment of their client's risks aligns with the client's best interests. As a result, their clients will receive the optimal level of advice.

In the First Circuit, the calculus will be very different, for corporate lawyers will be chilled from being as thorough as necessary and from reducing their candid assessments to writing. Each time the lawyer considers writing a legal memorandum or jotting down notes from a factual investigation, he will have to determine whether doing so could damage the company's interests in discovery. This will discourage any reasonable lawyer from "engaging in the writing, note-taking, and communications so critical to effective legal think-

ing." *In re Sealed Case*, 146 F.3d at 886-887. And that perverse incentive will plainly disadvantage the client by diminishing its ability to make an informed decision and increasing its exposure to litigation. Deterring lawyers from reducing their thought processes and analysis to writing virtually ensures that the advice ultimately given to the client will not be as thorough as it should be. As the D.C. and Second Circuits have observed, if a company "scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself ... to ill-informed decisionmaking," and will "inevitably reduce voluntary compliance with the law [and] produce more litigation." *Adlman*, 134 F.3d at 1200; *In re Sealed Case*, 146 F.3d at 887.

* * *

The damaging effects from the decision below could not come at a worse time. Ever since the fall of Enron and subsequent significant corporate failures, the government and the business community have made a concerted effort to focus on improved corporate legal compliance and to prevent future scandals and devastating losses. The lesson learned from many of these debacles was a need to prevent future "gatekeeper failure." Coffee, Jr., *Understanding Enron*, 57 Bus. Law. 1403 (2002). That is, the forces in the system that were empowered to curb or prevent corporate excess (including lawyers, accountants, and independent directors) failed to do so. Accordingly, Congress, the SEC, and professional associations have tried to reinvigorate gatekeeping functions. In particular, the "spotlight is now focused on lawyers." Coffee, Jr., *The Attorney as Gatekeeper*, 103 Colum. L. Rev. 1293, 1293 (2003). Indeed, under the Sarbanes-Oxley Act, both Congress and the SEC are increasingly counting on attorneys to steer corporations to legal compliance. Duggin, *supra*, at

1033. In this new environment, courts should support lawyers performing this important role with all the tools they need to fulfill it. Because the First Circuit's decision does precisely the opposite, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates issues of vital concern to the nation's business community in matters before the courts, Congress, and the Executive Branch. The Chamber frequently appears as an *amicus* in this Court in cases that affect the interests of American businesses and the public welfare, drawing on the vast experience of its members to illustrate the practical ramifications of legal disputes. And when misguided decisions of lower courts on matters of great importance threaten the interests of the business community and the greater public, the Chamber supports petitions for this Court's review. This is such a case.

This case addresses the meaning and scope of the work product privilege codified in Federal Rule of Civil Procedure 26(b)(3), which protects from discovery

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties were notified ten days prior to filing and have consented to the filing of this brief. Counsel for Petitioner filed a blanket letter of consent with this Court on January 4, 2010, and a letter of consent from Respondent has been submitted to the Clerk concurrently with this filing.

materials "prepared in anticipation of litigation or for trial." The First Circuit's decision artificially limits this privilege to documents prepared "for use" in litigation. Pet.App. 11a-18a. That construction departs from the text of Rule 26(b)(3), rendering "in anticipation of litigation" meaningless, and divorces the rule from its underlying purpose—to protect attorneys' theories, strategies, and assessments of potential and ongoing litigation, whether prepared "for use" in litigation or not. From a practical perspective, moreover, the "for use" test ignores the manner in which modern businesses rely upon legal counsel. If not reversed, the First Circuit's decision will gravely impact the ability of businesses to make well-informed, prudent decisions and ensure compliance with the law.

"In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law . . . .'" *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (citation omitted). Numerous decisions routinely facing American businesses require an assessment of potential liability and litigation strategies and risks. These run the gambit from internal investigations evaluating legal risks and ensuring compliance with the law to mandatory analyses of potential liabilities for financial reporting purposes and legal assessments undertaken to evaluate or accomplish complex corporate transactions. All require counsel candidly to assess litigation risks, legal strategies, and settlement positions. Yet, because they are generally *not* prepared "for use" in litigation, the First Circuit's decision renders counsel's recorded analyses and impressions wholly discoverable by

litigation adversaries, who will use them as a "roadmap" in the litigation—undermining the traditional notions of justice in our adversary system that this Court sought to protect through the work product privilege. Under the First Circuit's narrow conception of the privilege, "[i]nefficiency, unfairness and sharp practices" will "inevitably develop in the giving of legal advice," and "[a]n attorney's thoughts, heretofore inviolate," will "not be his own." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If left standing, the First Circuit's fundamentally misguided rule will not only frustrate businesses' legitimate interests in proactive investigation, prudent decisionmaking, and legal compliance, but will also harm the interests of regulatory agencies and the greater public in fostering corporate self-reporting and compliance with an increasingly-complex array of regulations governing corporate conduct.

The decision below exacerbates a vexing conflict among the Courts of Appeals about the meaning and scope of the work product privilege, and no interests would be served by delaying this Court's review. By announcing a new and far more limited standard that conflicts with the law of every other circuit, the First Circuit's opinion creates great uncertainty for companies that have come to rely on the work product privilege in carrying out every transaction, investigation, and action that calls for litigation analysis. Because many businesses never can be certain where work product issues will be litigated, the First Circuit's "for use" test threatens, *de facto*, to become the law of the land. The Chamber urges this Court to grant *certiorari* now to provide members of the business community with clear guidance on the

scope of the work product privilege and clarify the approach courts should use in determining whether materials are protected under Rule 26(b)(3). There is no reason to allow this issue to percolate any further. As Judge Torruella stated in his dissent below, "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country." Pet.App. 45a (Torruella, J., dissenting).

ARGUMENT

I. THE FIRST CIRCUIT'S DECISION IGNORES THE LANGUAGE OF RULE 26(B)(3) AND THE PURPOSES OF THE WORK PRODUCT PRIVILEGE

"Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation." *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998). To the contrary, Rule 26(b)(3) expressly protects from discovery those materials "prepared in anticipation of litigation or for trial." As this Court has recognized, the rule covers more than materials prepared for use in litigation: "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney *in contemplation of litigation* which set forth the attorney's theory of the case and his litigation strategy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (emphasis added). Under its "for use" test, however, the First Circuit has effectively limited the work product privilege to materials prepared "for use in" litigation, rendering "in anticipation of

litigation" meaningless. This narrowing construction finds no support in the text or well-established rules of construction, which dictate that "no provision ... be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality).

The First Circuit's interpretation also undermines the purposes of the work product privilege. This Court first endorsed the work product privilege in *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* held that an attorney's witness interview memoranda, created during the course of an accident investigation, were protected "attorney work product" and thus not discoverable in subsequent litigation arising from the accident. *Id.* at 511. The Court's conclusion was grounded both in common law and practical considerations—privacy, efficiency and fairness in the administration of justice. As the Court explained, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Our adversarial system requires that an attorney be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. Thus, the "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs"—the core "work product of the lawyer"—must be privileged. *Id.* Otherwise, "much of what is now put down in writing would remain unwritten," and "[a]n attorney's thoughts, heretofore inviolate, would not be his own." *Id.* These "historical and ... necessary" principles, *id.*, which lay the foundation for Rule 26(b)(3), *Upjohn*, 449 U.S. at 398 (1981), "promote

justice," "protect ... clients' interests," and are essential to "an orderly working of our system of legal procedure," *Hickman*, 329 U.S. at 511-12. Without the work product privilege, "[i]nefficiency, unfairness, and sharp practices would inevitably develop." *Id.* at 511.

The forced disclosure of Textron's tax accrual workpapers violates the fundamental principles that animated this Court in *Hickman*. These workpapers include spreadsheets and supporting documentation that together reflect the opinions of Textron's attorneys about the company's potential tax liability, including the likelihood that Textron would prevail in litigation with the IRS over Textron's tax positions. *See* Pet.App. 92a-93a. The First Circuit nonetheless excluded Textron's tax accrual workpapers from the protection of the privilege based on its finding that they are "independently required by statutory and audit requirements." Pet.App. 9a.[2] But there is "no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance." *Adlman*, 134 F.3d at 1200. Regardless of whether counsel's evaluation of potential litigation is created "for use" in that litigation

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[2] This finding, however, is not supported by law or the record. Although companies create tax accrual workpapers to assist in the financial reporting process, no statute, regulation or audit standard requires the creation of such documents. Moreover, when the Financial Accounting Standards Board ("FASB") promulgated FASB Interpretation No. 48: Accounting for Uncertainty in Income Taxes (June 2006), FASB stated that it "does not intend to imply a documentation requirement" in connection with a company's accounting for contingent tax reserves in its financial statements. *Id.* at app. A, ¶A1.

or—like Textron's tax accrual workpapers—for another purpose that requires the anticipation and analysis of litigation, it may equally comprise "analys[es] that candidly discuss[] the attorney's litigation strategies, appraisal[s] of likelihood of success, and perhaps the feasibility of reasonable settlement," thus "fall[ing] squarely within *Hickman*'s area of primary concern." *Id.* When businesses analyze their tax accrual positions for purposes of financial reporting, they must, as a practical matter, turn to counsel. This is manifest under current U.S. Generally Accepted Accounting Principles ("GAAP") reporting requirements. In 2006, FASB explained that the analysis of whether a company is likely to succeed in its tax position—and thus whether it must accrue for and disclose a potential loss—"is a matter of judgment based on the facts and circumstances of that position evaluated in light of all available evidence." FASB Interpretation No. 48, at 5. It is also "a matter of tax law" and, "in some cases, the law is subject to varied interpretation, and whether a tax position will ultimately be sustained may be uncertain." *Id.* at 2. A company must consider the ultimate result of a challenge to its tax positions through litigation, and also must presume that tax authorities have complete knowledge of all relevant information.

The potential for litigation in these circumstances, moreover, is very real. *Every* tax return filed by Textron is audited by the IRS. Pet.App. 50a. And these audits often lead to litigation.[3] Pet.App. 90a-91a.

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[3] Most courts that have addressed the issue have recognized that "litigation" is not limited to the context of a civil or criminal trial. The work product privilege covers materials prepared in a range of adversary postures; "'[a]dversarialness' is the touchstone

After all, as the District Court found, it was only because of the realistic prospect of disputes with the IRS that Textron's counsel created materials evaluating the likelihood of success in litigation and potential litigation strategies. *See* Pet.App. 108a ("[I]t is clear that the opinions of Textron's counsel . . . would not have been prepared at all 'but for' the fact that Textron anticipated the possibility of litigation with the IRS."). Further, these materials undeniably reflect counsel's "thoughts," "mental impressions," and "opinions," and are therefore the core "work product" of Textron's attorneys, *see Hickman*, 329 U.S. at 511, as they "will inexorably contain [counsel's] theory of the case and may communicate . . . some litigation strategy or settlement advice." *Sears, Roebuck & Co.*, 421 U.S. at 159-60; *see also Roxworthy*, 457 F.3d at 595, 597 (tax opinion rendered by an accounting firm at the request of counsel prior to the filing of a tax return is work product); *Long-Term Capital Holdings v. United*

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of this approach to the 'litigation' question." *In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D. Mass. 2004). The Restatement of the Law Governing Lawyers thus defines "litigation" in the work product context to include an "adversarial proceeding before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial," or any proceeding in which "evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues." Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000). This amply covers Textron's anticipated adversarial administrative proceedings and other disputes with the IRS. As the Sixth Circuit has explained, "a document prepared in anticipation of dealing with the IRS . . . may very well have been prepared in anticipation of an administrative dispute and this may constitute litigation within the meaning of Rule 26." *See United States v. Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (internal quotation marks omitted).

States, No. 3:01 CV 1290 (JBA), 2002 WL 31934139, at *8 (D. Conn. Oct. 30, 2002) (legal opinion obtained prior to sale of preferred stock is privileged against IRS subpoena); *Black & Decker Corp. v. United States*, 219 F.R.D. 87, 91 (D. Md. 2003) (documents containing tax analysis prior to filing tax return are work product).

The admonitions in *Hickman* regarding the unfairness and sharp practices that result when work product is not privileged are also vividly illustrated and borne out in this case. The government unapologetically concedes that it seeks these workpapers because they are a roadmap to Textron's self-assessed "soft spots" in its tax return. Appellant Br. at 31-32 (1st Cir. Jan. 25, 2008). The IRS admits that it does not want the workpapers for their factual content because the IRS indisputably has access to all of the facts underlying Textron's tax positions. Rather, the IRS intends to use the legal analysis of Textron's counsel as a "tool" in "the IRS's arsenal" that will "ease" its ability to challenge Textron's tax positions. Petition for Rehearing *En Banc* at 14-15 n.12 (1st Cir. Mar. 9, 2009). But "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring). And the IRS has no special warrant or need for exception. The IRS' summons power is "'subject to the traditional privileges and limitations,'" *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (quoting *United States v. Euge*, 444 U.S. 707, 714 (1980)),[4] but it has ample tools to require taxpayers to

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[4] In *Arthur Young*, this Court held that the government was entitled to workpapers created by a corporation's independent auditor regarding the corporation's tax return, 465 U.S. at 813-14,

disclose relevant factual information.[5] Permitting the IRS, in addition, to demand the tax accrual workpapers of businesses during audits—which are inherently adversarial—would foster exactly the sort of sharp practices forbidden by the work product privilege. *See Roxworthy*, 457 F.3d at 595 ("[T]he IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged."); *Delaney, Migdail & Young Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (where

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but nothing in that decision suggested workpapers created by the taxpayer's counsel lose their privileged status merely because they are shared with an auditor. To the contrary, the Court explained that the policies supporting the work product privilege were not implicated in *Arthur Young* because an independent auditor's "public watchdog" function is fundamentally different from a lawyer's role as counsel and advocate for his client. *See id.* at 817-18 ("The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role.").

[5] For example, the IRS has authority to create the forms (including tax return forms) with the specific information that the IRS deems necessary to be provided by taxpayers, *see* I.R.C. § 6011(a); to require disclosure of specific transactions such as the kinds of "listed" transaction by Textron that the IRS is evaluating, *see* Treas. Reg. § 1.6011-4; to require the detailed disclosure of book-tax differences, *see* IRS Schedule M-3 (Form 1120, used by the IRS in corporate taxpayer audits); to obtain, during an audit, factual information needed to ascertain the correctness of a tax return or determine a taxpayer's correct liability, *see* I.R.C. § 7602(a); and to issue administrative summonses for records and testimony not only of the taxpayer and its employees but also of third parties, *id.* §§ 7602(a)(2), (3).

requesting party sought "attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case," it was "precisely the type of discovery the Court refused to permit in *Hickman*"). Without work product privilege, companies would be forced to turn over their most sensitive tax analyses to the IRS as well as other regulatory agencies and private litigants. *See* Pet. at 26. Any short-term benefit the First Circuit's decision provides to the Government or the plaintiffs' bar, however, would be far outweighed by the obstacles it creates for companies attempting to obtain efficient and candid advice of counsel and to comply fully with their financial reporting obligations.

II. THE FIRST CIRCUIT'S "FOR USE" TEST THREATENS TO UNDERMINE THE ATTORNEY-CLIENT RELATIONSHIP AND PUNISH BUSINESSES FOR THEIR PRUDENT RELIANCE ON COUNSEL

Beyond the specific tax accrual workpaper context addressed in this case, the "for use" test adopted by the First Circuit threatens to destroy businesses' ability to obtain candid and thorough analyses of litigation-related business matters. Unless this decision is reversed, it will directly harm American businesses, shareholders, regulatory agencies, and the public interest. Today, businesses routinely use counsel, *inter alia*, in (i) internal investigations to evaluate potential legal risks and ensure compliance with the law; (ii) legal analyses necessary to fulfill financial reporting obligations; and (iii) assessments of impending or current litigation affecting complex corporate transactions. In all of these contexts, companies routinely employ lawyers to evaluate

litigation risks, strategies, and settlement positions "in anticipation of" litigation to help them comply with legal obligations and make better business decisions. In a world governed by the "for use" test, adverse parties will routinely demand access to counsel's notes, analyses and other materials underlying counsel's work—but not necessarily shared with the client and protected by the attorney-client privilege—and businesses that diligently and aggressively investigate and consider issues arising from anticipated or ongoing litigation will be forced to divulge these sensitive materials to regulatory agencies or other adversaries.[6] The "for use" test thus will create an incentive *not to* investigate or consider such issues, which will harm the interests of companies, shareholders and ultimately the public at large. *See EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 966 (D.C. Cir. 1999) ("Weakening the ability of lawyers to represent clients at the pre-claim stage of anticipated litigation [by reducing work product protection] would inevitably reduce voluntary compliance with the law, produce more litigation, and increase the workload of government law-enforcement agencies.") (internal quotation marks omitted).

Under the First Circuit's narrow conception of the work product privilege, companies will face the

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[6] Indeed, in civil suits against corporate defendants, plaintiffs stand to benefit from the *Textron* decision, *see* Michelle M. Henkel, *Textron Eviscerates the 60-Year-Old Work Product Privilege*, 125 Tax Notes 237, 241 (2009), and SEC Enforcement Director Robert Khuzami recently announced that, in light of the *Textron* decision, no company documents in the possession of an auditor should be regarded as privileged work product. *See* Yin Wilczek, *Khuzami: SEC in Final Stages on Cooperation Agreement, Skeptical of Work Paper Shield*, 5 Acct. Pol'y & Prac. Rep. (BNA) 1118 (Dec. 11, 2009).

constant threat of disclosure to litigation adversaries of their counsel's findings and analyses, because the most sensitive materials prepared by counsel often are not prepared for conveyance to the client, and they therefore fall entirely outside the protection of the attorney-client privilege. *See* 2 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 791 (5th ed. 2007) ("[T]he [attorney-client] privilege extends only to client communications, while work product encompasses much that has its source outside client communications . . . ."). Often, these documents are created to preserve the results of counsel's investigations and formulate the finalized advice that is shared with the client. *See Hickman*, 329 U.S. at 511 ("Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . ."). And many documents, including audit letters and tax accrual workpapers, are outside the attorney-client privilege because they are prepared in order to be shared with third parties assisting the client. 8 Charles Alan Wright et al. *Federal Practice and Procedure* § 2024 (2d ed. 1994). By eviscerating the work product privilege for all of these documents because they were not prepared for use in the litigation assessed, the First Circuit's test places "an untenable"—and unfair—"choice upon a company":

> If the company declines to make such analysis or scrimps on candor and completeness to

> avoid prejudicing its litigation prospects, it subjects itself ... to ill-informed decision-making. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Adlman, 134 F.3d at 1200.

A review of the contexts in which counsel routinely prepare analyses that would be instantly discoverable under the First Circuit's test illustrates the gravity and importance of these issues and the need for immediate review.

A. Internal Investigations and Compliance

Courts and the business community have long appreciated that "[v]oluntary compliance with the law often depends on sound legal advice" and "sound legal advice in turn often depends on the attorney-client and work product privileges." *Lutheran Social Servs.*, 186 F.3d at 966. This is because "[a] corporation's attorney ... is positioned to impart 'preventive' legal advice; she acts as a private law enforcement agent." John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 475 (1982). In particular, companies regularly commission internal investigations, led by counsel, upon discovery of potential violations of law or significant risks posed by company actions or products. These investigations are necessary to determine the relevant context and potential legal implications, and allow the company to take appropriate corrective action. And courts have recognized that because the "suspicion" of legal violations signals the possibility that litigation—

"criminal prosecutions, derivative suits, securities litigation, or even litigation ... to recover ... illegal payments"—may occur, internal investigations into such violations are performed "in contemplation of litigation." *In re Grand Jury Investigation*, 599 F.2d 1224, 1227, 1229-30 (3d Cir. 1979); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445-49 (S.D.N.Y. 2004) (holding that corporate counsel's internal investigative material, shared with outside auditors in connection with an audit of internal controls, was privileged work product). Indeed, in these circumstances, "the potential for litigation [is] immeasurably intensified by [the company's] legal obligations to report any wrongdoing to its stockholders and to various governmental agencies." *In re Grand Jury Investigation*, 599 F.2d at 1229.

Nevertheless, under the First Circuit's test, because they are prepared under compulsion of law or for purposes of voluntary compliance and not "for use" in litigation, most internal investigative materials prepared by counsel—including notes and other materials underlying the investigation but not shared with the client—would no longer be protected as work product. The resulting "chilling effect" would inhibit "a company seeking legal advice." David M. Zornow & Keith D. Krakaur, *On The Brink Of A Brave New World: The Death Of Privilege In Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 149 (2000). The harm done would far outweigh any momentary advantage that the First Circuit's rule provides the IRS and other regulators.

For example, companies often turn to outside counsel and consultants to investigate, diagnose, and create remediation plans for potential environmental

harms and dangers. The process of evaluating and remedying potentially disastrous toxic torts must be undertaken in a quick and decisive fashion. *See Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1263 (3d Cir. 1993) ("We should encourage the voluntary, cooperative, and speedy resolution of workplace safety problems ...."). The materials developed in this context that reflect the mental impressions of counsel, including materials not shared with the client, have been traditionally afforded work product protection, even though not created "for use" in litigation. *See id.* at 1261 (work product privilege applied to an outside consultant's emissions report); *ECDC Envtl., L.C. v. N.Y. Marine & Gen. Ins. Co.*, 96 Civ. 6033 (BSJ)(HBP), 1998 WL 614478 (S.D.N.Y. June 4, 1998) (work product privilege applied to materials created during the investigation of an accidental spill of 3,000 tons of "spoils" into the ocean); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992) (work product privilege applied to materials generated during the course of discussions with an environmental agency about the investigation and clean-up of hazardous waste). By withholding the work product privilege from these materials, the "for use" test will discourage companies from employing counsel for such investigations, or discourage counsel from documenting their findings and analyses. This will undermine governmental efforts to encourage corporate self-evaluation and self-reporting, and benefit no one.

Companies also routinely employ counsel to aid their efforts to comply with the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1 to -3, which prohibit U.S. companies from making offers and payments with corrupt intent

to foreign officials for the purpose of obtaining or retaining business. Violations of the FCPA can yield hefty civil fines and, in some cases, criminal penalties. *SEC v. Halliburton Co. & KBR, Inc.*, Litigation Release No. 20897A (SEC Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm (detailing $579 in civil and criminal fines for FCPA violations). FCPA violations are typically discovered by companies themselves and confirmed only after an internal investigation is completed. *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008). Although these investigations are effectively compelled by law, FCPA enforcement is nevertheless largely dependent upon companies self-reporting to the Government. *See id.* ("[T]he SEC and the DOJ have enthusiastically embraced the role that self-monitoring and cooperation play in assisting their investigations."). By eliminating the privilege for materials generated during such internal investigations, the "for use" test will undermine the policies and enforcement of the FCPA; again, with no corresponding benefit.

The Sarbanes-Oxley Act also effectively requires businesses to undertake internal investigations. "Under Sarbanes-Oxley, Audit Committees and company management are required to address whistleblower complaints and other indicia of potential wrongdoing or face liability." Paul D. Sarkozi, *Internal Investigations: An Overview of the Nuts and Bolts and Key Considerations in Conducting Effective Investigations, in Internal Investigations: Legal Ethical & Strategic Issues*, at 95, 99 (PLI Corp. Law Practice, Course Handbook Series No. 1564, 2006). "Similarly, under Delaware and other states' corporate

law, a failure to address 'red flags' may be found to constitute a breach of fiduciary duty." *Id.* But under the First Circuit's test, even though public companies that conduct investigations into whistleblower allegations regarding "any provision of Federal law relating to fraud against shareholders" (18 U.S.C. § 1514A(a)(1)) may very well "anticipate litigation," their counsel's findings and analyses will no longer be entitled to the protection of the work product privilege. In this context too, the First Circuit's test will discourage the prudent investigations that the law should foster and protect. Moreover, providing the government with the power to obtain and rely upon counsel's sensitive analyses in enforcement proceedings against businesses risks abandoning our adversarial system for one that is fundamentally inquisitorial.

B. Financial Reporting

The First Circuit's standard will also hamstring companies' ability to work efficiently with outside counsel on analyses that relate to financial reporting, in areas that extend far past the immediate context of tax accrual workpapers. Under U.S. GAAP—more specifically, FASB Accounting Standards Codification Topic 450[7]—companies must account in their financial statements for "loss contingencies," including "[o]bligations related to product warranties and product defects," "[p]ending or threatened litigation" and "[a]ctual or possible claims and assessments." Codification of Accounting Standards, Loss Contingencies, 450-20-05-3, 05-10 (FASB 2009). When

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[7] Topic 450 was formerly Statement of Financial Accounting Standards No. 5, or "FAS 5."

considering whether they must make a disclosure or record a loss, companies must consider, among other things, the probability of an unfavorable outcome and their ability to make a reasonable estimate of the amount of loss. *Id.* at 55-10. As with contingent tax liabilities, the company is expected by FASB to seek "[t]he opinions or views of legal counsel and other advisors," who generally are in the best position to analyze litigation risks, strategies, or settlement, as well as the strengths and weaknesses of the company's positions. *Id.* at 55-12. Such analyses are prepared by counsel because of litigation (or potential litigation) that counsel is overseeing and evaluating on a daily basis. But because these analyses generally are not prepared "for use" in the litigation, they would be freely available to adverse parties under the First Circuit's standard.

As applied in this context, the First Circuit's standard would lead to absurd and confused results. For instance, a company may request two identical analyses of litigation risks from the exact same counsel, but depending on the "use" for which the company seeks the analyses, counsel's underlying materials will be privileged in one instance and fair game for adversaries in the other. If the analyses are prepared to develop the company's strategy for actual use in the litigation, the underlying materials will likely be privileged. But if they are prepared to help the company gauge its potential litigation exposure in the context of financial reporting under FASB ASC Topic 450, or in cooperation with outside auditors,[8] the

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[8] As one court has explained, sharing privileged materials between a company and its auditor "is precisely the type of limited alliance that courts should encourage," because it furthers the

underlying materials would not be privileged. Even though "audit letters" from counsel to outside auditors constitute "legal analysis that falls squarely within *Hickman*'s area of primary concern—analysis that candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement," *Adlman*, 134 F.3d at 1200—businesses would be forced to share these audit letters with adversaries, as well as a host of other sensitive analyses of "loss contingencies" regarding litigation or potential litigation. This development would seriously harm American businesses, many of which are regularly involved in high-stakes commercial litigation that could be dramatically influenced by the discoverability of their counsels' candid litigation analyses.

C. Analysis of Complex Transactions

Finally, corporations regularly rely on the assistance of counsel when engaging in business transactions that may result in litigation. *See, e.g., id.* at 1195, 1199 (noting that legal analysis of corporate transactions should be privileged because "whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation"). For example, when conducting diligence with respect to such a business combination, a company will request an assessment of the impact of the counterparty's pending or potential litigation on the combined enterprise. Because the point of such analyses is to assess the outcome of litigation or anticipated litigation, these materials have

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company's and the public's interests in detecting and rooting out corporate malfeasance. *Merrill Lynch & Co.*, 229 F.R.D. at 448.

traditionally been protected by the work product privilege on behalf of the combined entity. *See id.* at 1199-200; *see also* Anne King, Comment, *The Common Interest Doctrine and Disclosures during Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1423 n.70, 1424 n.77, 1425 n.80, 1429 n.107 (2007) (discussing application of work product privilege in the context of mergers and collecting cases). Because they are not prepared "for use" in litigation, however, the First Circuit's test categorically excludes their protection. By discouraging companies from relying on or requesting these analyses, the "for use" test will reduce the effectiveness of diligence that companies engage in before undertaking such transactions and, ultimately, benefit no one.

III. THE BUSINESS COMMUNITY NEEDS THIS COURT'S GUIDANCE

As this Court has recognized, "[a]n uncertain privilege, or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. There is now a well-defined three-pronged split on the appropriate standard for discerning whether materials are entitled to work product protection: the majority "because of" test; the Fifth Circuit's "primary motivating purpose" test; and the First Circuit's new "for use" test. *See* Pet. at 12-16. This split leaves the Chamber and its members unable to assess whether their attorneys' materials will be privileged or subject to subpoena or discovery, and for many of the Chamber's members will effectively make the most limited conception of the privilege—that afforded by the First Circuit's "for use" test—the law of the land.

The "for use" test provides litigants seeking the disclosure of sensitive legal analyses and related materials with a massive incentive to forum shop and file suit in the First Circuit whenever possible. And forum shopping will often be possible because American businesses typically are subject to suit in numerous jurisdictions. Companies potentially subject to suit in the First Circuit will, as a practical matter, be forced to assume that the "for use" test applies when dealing with counsel in their internal investigations, financial reporting, and transactions. Without review by this Court, these companies will need to alter fundamentally (and for the worse) the ways in which they ensure legal compliance and make significant business decisions, and the business community will be forced to grapple with a new reality of unfair and abusive practices by government agencies and litigation adversaries.

CONCLUSION

The petition for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR THE COMMITTEE ON TAXATION AND COMMITTEE ON CORPORATE REPORTING OF FINANCIAL EXECUTIVES INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

This brief is submitted jointly by the Committee on Taxation and Committee on Corporate Reporting of Financial Executives International (FEI). FEI, a non-profit corporation organized in 1931, is a membership organization for corporate financial managers. FEI's 15,000 members hold policy-making positions as chief financial officers, treasurers, and controllers in over 8,000 corporations throughout the United States and Canada. FEI serves as the leading advocate for the views of corporate financial management, representing both providers and users of financial information. FEI's Committee on Corporate Reporting analyzes and responds, as appropriate, to proposals, statements, pronouncements, and regulations affecting financial accounting and financial statement disclosure issued by the Securities and Exchange Commission, the Financial Accounting Standards Board, the Public Company Accounting Oversight Board, and the International Accounting Standards Board. FEI's Committee on Taxation formulates positions on tax legislation, policies, practices, and rules and regulations, which are then communicated to the executive and legislative branches of the federal government.[1]

This case presents an important issue to FEI's members. Within their respective employer companies,

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[1] In accordance with Rule 37.6, FEI certifies that counsel for a party did not author this brief in whole or in part and that no entity other than FEI, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

FEI's members are typically responsible for the preparation of financial statements in accordance with generally accepted accounting principles. Those financial statements are subject to audit by the companies' independent auditors. Many of FEI's members are also responsible, directly or indirectly, for the preparation and filing of tax returns and for defense of those returns in response to an IRS audit. FEI's members thus have a strong interest in the outcome of this case and its potential effect on their ability to prepare the most accurate possible financial statements while still retaining work-product protection against disclosure of the mental impressions of their attorneys in potential litigation. Because of that strong interest, FEI filed a brief as *amicus curiae* in the court of appeals, and it believes that it is important to share those views with this Court as well. FEI brings a dual financial reporting and tax perspective to the issues raised in this appeal that it believes will make its views of assistance to the Court.

Counsel of record for the parties received timely notice of FEI's intent to file this amicus curiae brief more than ten days before the due date. The parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

REASONS FOR GRANTING THE PETITION

This case has broad implications for the operations of all publicly held companies. The court of appeals' decision threatens the ability of publicly held companies to develop and protect evaluations of their litigation positions, in tax and other areas, that are necessary for the proper operation of their businesses. Fundamentally, the decision creates an unnecessary

and undesirable conflict between a company's need to take into account material loss contingencies in preparing its financial statements and its legitimate interest in protecting from its adversaries its counsel's mental impressions of litigation prospects. The work-product privilege exists to provide that protection, and this Court should act to preserve its efficacy for public companies that act in the interest of their shareholders and the public by having their counsel prepare litigation analyses.

A. Review is Warranted Because the Court of Appeals' Decision Will Adversely Affect Companies' Ability to Develop and Protect Candid Assessments of Their Litigation Positions in Both Tax and Other Areas

Publicly traded companies must prepare financial statements in accordance with generally accepted accounting principles (GAAP). *See* Securities Act of 1933, § 19(a), 48 Stat. 74, 85, codified as amended at 15 U.S.C.A. §§ 77g, 77aa (Schedule A); Securities Exchange Act of 1934, § 13(b), 48 Stat. 881, 894-95, codified as amended at 15 U.S.C.A. § 78m(b)(2).[2] Under GAAP, a company may be required to accrue a current expense related to material loss contingencies or to disclose information about such loss contingencies

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[2] Today in the United States, GAAP used by publicly traded companies is generally established by the Financial Accounting Standards Board (FASB). Although the SEC has statutory authority to promulgate financial accounting standards, it views accounting standards established by the FASB as authoritative. Sarbanes-Oxley Act of 2002, § 108, Pub. L. No. 107-204, 116 Stat. 745, 768-69.

in its published financial statements. In March 1975, the FASB promulgated Financial Accounting Standard (FAS) No. 5 (Accounting for Contingencies) to establish standards for financial accounting and reporting of all material loss contingencies, including those related to income taxes. Under FAS 5, material loss contingencies include pending or threatened litigation or possible claims and assessments and would include pending or threatened litigation with the IRS. FAS 5 ¶ 33.

In general, an estimated loss from a loss contingency must be accrued if it is probable that a liability has been incurred and the amount of the liability can be reasonably estimated. *Id.* ¶ 8. In some circumstances, the nature of the contingency must be disclosed in financial statements. *Id.* ¶¶ 9, 10. In evaluating whether accrual or disclosure is required under FAS 5, a company should consider, among other things, "the opinions or views of legal counsel and other advisers." *Id.* ¶ 36.

In June 2006, the Financial Accounting Standards Board issued FASB Interpretation No. 48 *Accounting for Uncertainty in Income Taxes* (FIN 48), which specifically addresses the GAAP standards for uncertain income tax positions.[3] Together, FIN 48 and FAS 5 establish a GAAP requirement that public companies

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[3] FIN 48 is an interpretation of FAS No. 109 (Accounting for Income Taxes), which provides general guidance on GAAP accounting for income taxes. As the Summary accompanying FIN 48 acknowledges (at 2), however, FAS 109 "contains no specific guidance on how to address uncertainty in accounting for income tax assets or liabilities."

must evaluate the possible impact of any and all material loss contingencies – both tax and non-tax – on their financial statements.[4]

In auditing the financial statements of a publicly traded company, an independent auditor must follow generally accepted auditing standards. *See* 17 C.F.R. § 210.1-02(d); C.A. App. 40.[5] Under those standards, the primary objective of the audit is to express an

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[4] Effective for accounting periods ending after September 15, 2009, authoritative guidance on U.S. GAAP has been codified in a single FASB publication, the FASB Accounting Standards Codification. According to the FASB, the Codification does not change GAAP for U.S. reporting companies. FAS No. 168 (The FASB Accounting Standards Codification™ and the Hierarchy of Generally Accepted Accounting Principles (June 2009)). The principles of FAS 5 and FIN 48 have been incorporated without material changes into the Codification. *See* Codification §§ 450-20 (Loss Contingencies) and 740-10 (Income Taxes).

[5] U.S. auditing standards traditionally were established by the American Institute of Certified Public Accountants (AICPA). Responsibility for establishing audit guidelines for publicly traded companies has now been assumed by the Public Company Accounting Oversight Board (PCOAB), a non-profit entity created under the Sarbanes-Oxley Act, subject to approval by the SEC. Pub. L. No. 107-204, § 101, 116 Stat. 745, 750-53. The PCAOB adopted interim auditing standards that essentially incorporated AICPA auditing standards as they existed on April 16, 2003, to the extent not subsequently superseded or amended by the PCAOB. PCAOB Release No. 2003-006 (Apr. 18, 2003). Those standards were later approved by the SEC. SEC Rel. No. 33-8222 (Apr. 25, 2003).

opinion on whether a company's financial statements fairly present its financial position, results of operations, and cash flows in conformity with GAAP. PCAOB Interim Auditing Standards (AU), AU § 110.01. The independent auditor must plan and perform the audit to obtain reasonable assurance that the financial statements are free from material misstatement. AU § 110.02. In so doing, the independent auditor must, through the audit, obtain evidence sufficient to afford a reasonable basis to express an opinion regarding the financial statements. *Id.* § 326.

Under generally accepted auditing standards, a company is expected to have adopted policies and procedures to identify and evaluate litigation, claims, and assessments in order to comply with GAAP. *Id.* § 337.02. The company is further expected to provide the independent auditor with a description and evaluation of all litigation, claims, and assessments. *Id.* § 337.05. In addition, in the course of an audit the independent auditor is expected to ask the company to ask its outside counsel to provide the auditor with information concerning litigation, claims, or assessments. *Id.* § 337.06, 337.08-.09. A complete response to those inquiries ordinarily will provide an evaluation of the likely outcome of the case, information that would prove valuable to a litigation adversary.

Thus, in order to prepare their financial statements in accordance with GAAP, and in anticipation that those financial statements will be evaluated by an independent auditor, public companies routinely maintain documents or analyses not unlike Textron's tax accrual workpapers for all manner of pending or threatened litigation. And, as with tax accrual work-

papers, companies share this analysis with their independent auditors so that the auditor can certify that the company has complied with GAAP. Although tax accrual workpapers, like other workpapers or analyses of material loss contingencies, might not be prepared primarily (or even tangentially) "'for use' in litigation" (Pet. App. 23a), they are prepared specifically because of the realistic prospect of identifiable litigation and they necessarily reflect public companies' (and their counsels') candid evaluation of the outcome of such pending or threatened litigation. They are not, as the court of appeals suggested, merely "tax documents" (*id.* at 15a), but are representative of the type of evaluation that is undertaken for a variety of contingencies. *See id.* at 33a (Torruella, J., dissenting). Preserving the confidentiality of such evaluations of litigation outcomes is critical to our adversarial system and lies at the core of the concern addressed by the work-product privilege codified in Fed. R. Civ. P. 26(b)(3).

If the court of appeals' decision in the context of tax accrual workpapers is allowed to stand, its ramifications will extend beyond the tax area. The court's holding will allow a company's non-tax adversaries to obtain discovery of the company's analysis of disputed issues that the company is required to maintain in order to comply with GAAP. Recognizing that this outcome would strike at the heart of the work-product privilege, lower courts confronted with this issue have generally found such materials to be protected.

For example, in *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006), the district court addressed whether "opinion letters" prepared by the defendant's in-house counsel

and shared with the defendant's independent auditor constituted protected attorney work product. The "opinion letters" summarized pending and threatened litigation against the defendant and its subsidiaries. The court found that the "opinion letters" reflected the attorney's judgment as to defendant's potential liability. *Id.* at 182-83. The court was satisfied that the "opinion letters" were prepared "because of litigation," given that in the absence of pending or threatened litigation, the defendant would have had no need to advise its independent auditor of these matters. *Id.* at 181.

Similarly, documents relating to accounting reserves for products liability litigation were found to be protected attorney work product in *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260 (SS), 1993 WL 561125 (S.D.N.Y. Dec. 23, 1993). The issue arose in a discovery dispute in the context of a class action brought by certain Pfizer shareholders, who alleged that Pfizer violated federal securities laws by failing accurately to disclose the company's financial exposure from product liability claims. The court found that the reserve figures for individual products liability cases reflected the "attorney's professional opinion as to the value of the tort claimant's suit." *Id.* at *4. Even applying the relatively stringent "primary purpose" test for determining whether documents that serve more than one purpose have work product protection, the court found that communications involving individual case reserves constituted opinion work product entitled to nearly absolute protection. *Id.; see also Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987) (individual case reserves protected from discovery as opinion work product); *Frank Betz Assocs., Inc. v. Jim*

Walter Homes, Inc., 226 F.R.D. 533 (D.S.C. 2005) (litigation reserve reflected in financial statements and disclosed to independent auditor protected from disclosure as attorney work product).

Like the tax accrual workpapers at issue in this case, documentation prepared by public companies to document and support the financial accounting treatment of non-tax loss contingencies typically reflects the professional judgment of attorneys about potential litigation outcomes and, as such, constitutes work product.

B. Contrary to the Court of Appeals' Decision, Protecting Tax Accrual Workpapers from a Summons by Its Litigation Adversary Would Strike the Appropriate Balance Between the Competing Interests of the Investing Public, the Internal Revenue Service, and the Policies Underlying the Work-Product Privilege

The court of appeals correctly observed that determining the scope of the work-product privilege involves a "balancing of policy concerns." Pet. App. 9a. Here, the issue of whether the Internal Revenue Service can, through its administrative summons power, compel the production of Textron's tax accrual workpapers involves at least three competing interests: the interest of the investing public in having access to accurate financial statements of publicly traded companies, the interest of the IRS in assuring that such companies pay the correct amount of tax, and the interests served by protecting attorney work product. The court of appeals, however, did not strike the appropriate balance among these sometimes competing interests. Indeed, its approach to "balancing" consisted almost

entirely of focusing on the IRS's interest in tax collection.

The interest of the investing public in having access to accurate financial statements of publicly traded companies requires that work product be protected. The integrity of securities markets requires that published financial statements fairly reflect a publicly traded company's financial position. "Corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public." *United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984). In providing assurance that a publicly traded company's financial statements fairly reflect its financial position, an independent auditor serves the public interest. *Id.* at 819. Responsible corporate management has a powerful incentive to provide an independent auditor with all information the auditor deems necessary to evaluate the adequacy of a company's financial statements. *See id.* But the court of appeals' holding that the work-product privilege does not apply to tax accrual workpapers creates substantial and unnecessary tension between the public interest in candid communications with an independent auditor and the policy of the work-product privilege to allow a potential litigant to protect its mental impressions and conclusions from its litigation adversary.[6]

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[6] In this regard, we note that the AICPA has observed that current IRS policies regarding requests for tax accrual workpapers could provide a disincentive to full disclosure. In IRS Announcement 2002-63, 2002-2 C.B. 72, the IRS announced changes to the policy of "restraint" noted in *Arthur Young & Co.*, 465 U.S. at 820-21. In an interpreta-

Applying the work-product privilege in this case does not trespass on the proper bounds of the IRS summons authority under 26 U.S.C. § 7602. Through its summons authority, the IRS has broad investigatory powers to determine the correct tax liability of any person. As this Court noted in *United States v. Arthur Young & Co.*, the summons authority "is critical to the investigative and enforcement functions of the IRS." 465 U.S. at 814 (*citing United States v. Powell*, 379 U.S. 48, 57 (1964)). But that authority is not unchecked; the summons authority remains "subject to the traditional privileges and limitations," including the protection for attorney work product. *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) (*quoting United States v. Euge*, 444 U.S. 707, 714 (1980)).[7]

As this Court explained when it first recognized the work-product privilege in *Hickman v. Taylor*, 329 U.S. 495 (1947), "it is essential that a lawyer work with a

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tion of auditing standards issued in April 2003, the AICPA referenced this announcement, noting that "[c]oncern over IRS access to tax accrual working papers might cause some clients to not prepare or maintain appropriate documentation of the calculation or contents of the accrual for income taxes included in the financial statements, or to deny the independent auditor access to such information." AU § 9326.07.

[7] The Court's holding in *Arthur Young* does not bear on this case. This case involves a well-established privilege for attorney work product, whereas *Arthur Young* addressed whether an entirely new privilege should be created. Unlike here, the workpapers involved in *Arthur Young* were prepared by independent auditors, not by the company's counsel.

certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Without this protection, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." *Id.* at 511. As such, the work-product privilege reflects the "strong public policy underlying the orderly prosecution and defense of legal claims." *United States v. Nobles*, 422 U.S. 225, 236-37 (1975) (internal quotations omitted). The work-product privilege generally may be overcome by a showing of substantial need, but a nearly absolute "special protection" is afforded to "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." *Upjohn Co. v. United States*, 449 U.S. at 398-402; Fed. R. Civ. P. 26(b)(3)(B).

This case presents an ideal vehicle for this Court to consider the broad issue of the circumstances under which competing interests should outweigh the traditional protection of a counsel's mental impressions of litigation prospects. The facts of this case are representative of those faced by most companies governed by the public reporting and auditing standards described above. The district court found that Textron's tax accrual workpapers principally consist of a spreadsheet identifying "items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and therefore, may be challenged by the IRS" and "estimates by Textron's counsel expressing, in percentage terms, their judgments regarding Textron's chances of prevailing in any litigation over those issues." Pet. App. 92a-93a. Textron used these workpapers to prepare its financial statements in accordance with GAAP. *Id.* at

93a-94a.[8] It is in order to preserve fairness in our judicial system by shielding precisely this kind of an analysis from compelled disclosure to an adversary that the work-product privilege was created.

There is no countervailing need for the IRS to have access to these workpapers that conceivably outweighs a company's interest in keeping its counsel's evaluation of litigation hazards out of the hands of its adversary. Apart from revealing a taxpayer's hazards assessment and thereby providing a tactical advantage, the tax accrual workpapers actually provide little information that will help the IRS make a determination of the correctness of a taxpayer's return. As the district court noted here, that determination "must be based on *factual* information, none of which is contained in the workpapers." *Id.* at 118a. Rather, Textron's tax accrual workpapers contain counsel's assessment of its prospects of prevailing on legally uncertain positions and "explain the legal rationale underpinning Textron's views of its litigation chances." *Id.* at 33a (Torruella, J., dissenting). As such, the workpapers reflect the kind of mental impressions and self-evaluation entitled to the highest degree of protection under the work-product privilege.[9]

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[8] Tax reserve amounts derived from its tax accrual workpapers were aggregated with other non-tax contingent liabilities and reported as "other liabilities" on Textron's financial statements. *Id.* at 94a.

[9] The law elsewhere recognizes the need for a sharp divide between facts and mental impressions in situations where a company's relationship with the government both demands transparency and is potentially adversarial. For example,

The integrity and fairness of our tax system relies in significant part on the willingness of all taxpayers to comply voluntarily with their tax reporting obligations. *See United States v. Arthur Young & Co.*, 465 U.S. at 815. But it does not follow that a company's litigation adversary should be able to use its governmental summons authority to obtain assessments of litigation prospects prepared by the company's counsel. As the dissent below correctly noted, an IRS audit is not necessarily adversarial, but it may become acutely adversarial and is likely to lead to litigation when a disagreement over the correct treatment of a material item arises – the very kind of dispute anticipated and evaluated in a company's tax accrual workpapers. Pet. App. 39a-40a. Further, the court of appeals' effort to justify its decision by asserting that the IRS confronts "practical problems . . . in discovering underreporting of corporate taxes" (*id.* at 20a), is unpersuasive. The IRS has many useful ways of obtaining the information necessary to audit corporate tax returns without having to rely upon attorney work product that consists of the mental impressions of a company's own counsel.

An IRS summons – or merely the implicit threat of such a summons – is a powerful tool enabling the IRS to investigate facts necessary to determine a com-

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the Truth in Negotiations Act (TINA) requires government contractors to provide extensive "cost and pricing data" to the government when negotiating a contract. 10 U.S.C. §§ 2306(f), 2306a. The statute makes clear, however, that the term "cost or pricing data" is limited to facts and "does not include information that is judgmental." 10 U.S.C. § 2306a(h)(1).

pany's tax liability, even when limited by claims of work-product privilege. Indeed, as the district court here noted, the IRS typically gathers relevant information from corporate taxpayers such as Textron using informal "information document requests" (IDRs) without ever resorting to its summons authority. *Id.* at 90a. The IRS issued more than 500 IDRs in the audit in which this dispute arises, and Textron responded to each of those IDRs save the ones that requested its tax accrual workpapers. *Id.* at 91a. In addition, large corporate taxpayers are required to submit as part of their annual income tax returns detailed information explaining differences between their reported taxable income and their book net income, a frequent area of inquiry by IRS auditors. *See* Form 1120, Schedule M-3. These additional mandatory disclosures were intended to increase transparency in corporate tax returns. Press Release, Treasury and IRS Unveil New Tax Form for Corporations (Jan. 28, 2004), 2004 TNT 19-16 (Jan. 29, 2004). Further, Congress and the IRS have imposed special reporting obligations, including penalties for noncompliance, with respect to suspected tax shelter transactions. *See* 26 C.F.R. § 1.6011-4 (disclosure of participation in reportable transactions); 26 U.S.C. § 6662A (enhanced penalties for understatements attributable to undisclosed reportable transactions); 26 U.S.C. § 6111 (report of reportable transactions by material adviser). Indeed, the transactions that triggered the issuance of the summons in this case were disclosed to the IRS pursuant to these reporting requirements. C.A. App. 14-16, 254.

A holding that Textron's tax accrual workpapers are protected attorney work product would not undermine the government's ability to secure relevant taxpayer

information through its summons power or other means. On the other hand, the court of appeals' decision that Textron's accrual workpapers are not "work product" would be very damaging to the operations of a company's business. It would expose an attorney's mental impressions not only to the IRS but also to private parties who are potential adversaries in all kinds of litigation that a company and its auditor are required to assess in preparing accurate financial statements.[10]

This Court has emphasized that the work product "doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The material in question here is core work product – namely, "the mental impressions, conclusions, opinions, or legal theories of [an] attorney . . . concerning the litigation"

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[10] As the dissent observed (Pet. App. 31a), the IRS has successfully argued for work-product protection when a potential litigation adversary seeks similar documents. In *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987), the IRS invoked the privilege to resist disclosure of documents that "advise[d] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome" – a description not materially different from the workpapers here. The majority's suggestion that these documents "were unquestionably prepared for potential use in litigation" (Pet. App. 18a & n.9) is entirely without foundation. The quoted language concerning "crafting its legal case" refers to the potential plaintiffs seeking the documents, not, as the majority suggests, to the IRS attorneys who prepared the documents.

– for which the law provides special protection even when the standards have been met for disclosure of other work product material prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3)(B). That special protection is necessary to provide "a privileged area within which [an attorney] can *analyze* and prepare his client's case." *Nobles*, 422 U.S. at 238 (emphasis added). The government nonetheless seeks disclosure of those mental impressions and analysis to the IRS for assistance in litigating a tax dispute against Textron – that is, disclosure to the very adversary and for the very purpose from which the work-product privilege is supposed to provide a shield. *See* Pet. App. 31a, 33a (Torruella, J., dissenting) (noting the IRS's admission that its purpose in requesting the workpapers is to obtain a tactical advantage in resolving its tax dispute with Textron). Approving that result would be the exact opposite of applying a "practical" approach to the work-product privilege. Accordingly, it is important that this Court grant certiorari to review the court of appeals' decision and to correct the erroneous undermining of a company's ability to protect its counsel's work product.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* in support of petitioner is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

Erosion of the work product privilege is deeply troubling to the American business community. Multistate businesses, such as those that are members of COST, routinely engage in a variety of transactions, the results of which regularly result in litigation with the Internal Revenue Service and with one or more of the fifty state departments of revenue. In anticipation of such litigation, businesses routinely engage counsel to evaluate proposed transactions and structures and to opine on the potential outcomes of the anticipated litigation.

Until recently, such opinions and memoranda were generally considered to be protected by both the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Petitioner and respondent have each consented to the filing of this brief.

attorney-client privilege and the work product privilege.[2] However, certain newly adopted financial reporting standards often compel businesses to provide copies of such opinions and memoranda to the businesses' auditors and, consequently, the attorney-client privilege is usually waived. As a result, the work product privilege has become the sole protection for attorneys' mental impressions reflected in such documents.

Most COST members are regularly engaged in state tax litigation—and most significantly—often litigating the same issue in several jurisdictions. Accordingly, COST members have a substantial interest in maintaining the sanctity of the work product privilege.

STATEMENT OF THE CASE

Petitioner's question presented addresses the scope of the federal work product privilege codified as Federal Rule of Civil Procedure 26(b)(3) ("Federal Rule 26(b)(3)"). Federal Rule 26(b)(3) states: "[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."

Eight federal circuits apply the "because of" test to determine whether a document had been prepared "in

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[2] Like petitioner, we refer here to the "work product privilege" instead of the "work product doctrine" or "work product protection."

anticipation of litigation" under Federal Rule 26(b)(3). *See* Pet. at 12. Under that test, a document satisfies the "in anticipation of litigation" requirement when it is prepared because of the possibility of litigation even if the document was prepared for other purposes as well. *See id.* at 12-13. In conflict with this majority rule, the Fifth Circuit applies the "primary purpose" test under which a document is deemed prepared "in anticipation of litigation" when the "primary motivating purpose" for preparing a document is to assist in litigation. *Id.* at 14-15.

In *United States v. Textron, Inc. & Subsidiaries*, Pet. App. 1a-46a ("*Textron*"), the First Circuit Court of Appeals aggravated the existing split between the majority rule and the Fifth Circuit by creating an altogether new test for determining when a document is prepared in "anticipation of litigation." Under that new test, a document is prepared "in anticipation of litigation" only when it is "prepared for use in possible litigation." Pet. App. 11a. As Judge Torruella demonstrated in dissent, *Textron*'s "for use in" test appears to be significantly narrower than both the widely-accepted and long-standing "because of" test and the Fifth Circuit's "primary purpose" test. Pet. App. 22a.

SUMMARY OF ARGUMENT

While resolution of the appropriate standard for determining whether a document has been prepared "in anticipation of litigation" is important in the context of federal litigation, such resolution is critical for litigants appearing in the courts in each of the fifty states as the state courts look to interpretations of Federal Rule 26(b)(3) when interpreting their own

work product privileges. If this Court does not resolve the federal circuit split, each of the state courts will be forced to resolve the issue on a case-by-case basis.

The new "for use in" test will compel litigants to waive otherwise valid state-level work product privilege claims. Once a litigant has been required to disclose a document that fails the "for use in" test when litigation occurs in the First Circuit, that litigant will be unable to claim work product protection for that document in another jurisdiction even if the document would have satisfied the "because of" or "primary purpose" test approved by that second jurisdiction. In effect, the availability of the work product privilege in subsequent litigation will depend upon whether a particular issue has already been litigated in a "for use in" jurisdiction.

ARGUMENT

I. The Split Among the Federal Courts Will Require Each of the Fifty States to Determine the Scope of the Work Product Privilege on a Case-by-Case Basis.

The decision of the Court of Appeals for the First Circuit in *Textron* confirms that there is a clear split among the federal circuit courts as to the circumstances under which a document is "prepared in anticipation of litigation" and therefore protected from discovery by Federal Rule 26(b)(3). *See e.g., United States v. Adlman*, 134 F.3d 1194 (2nd Cir. 1998) (employing the "because of" test); *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982) (employing the "primary purpose" test). The gravity of the federal court split cannot be overstated and, in fact, is

exacerbated because the courts in each of the fifty states look to the federal courts for guidance in interpreting their own work product privilege. Without this Court's resolution of the question presented, costly and resource-consuming discovery battles, at both the administrative level and before the state courts, will inevitably result.

Each of the fifty states has adopted a work product privilege that applies to civil litigation in the state's court system.[3] As is to be expected, the states' iterations of the work product privilege are either identical to, or substantially similar to, Federal Rule 26(b)(3). *See, e.g.*, *Soter v. Cowles Publ'g Co.*, 174 P.3d 60, 72 (Wash. 2007) (Washington's privilege is "nearly

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[3] Ala. R. Civ. P. 26(b)(3); Alaska R. Civ. P. 26(b)(3); Ariz. R. Civ. P. 26(b)(3); Ark. R. Civ. P. 26(b)(3); Cal. Civ. Proc. Code § 2018.030; Colo. R. Civ. P. 26(b)(3); Conn. Practice Book 13-3(a); Del. Super. Ct. Civ. R. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3); Ga. Code Ann. § 9-11-26(b)(3); Haw. R. Civ. P. 26(b)(4); Idaho R. Civ. P. 26(b)(3); Ill. Sup. Ct. R. 201(b)(2); Ind. R. Trial P. 26(B)(3); Iowa R. Civ. P. 1.503(3); Kan. Stat. Ann. § 60-226(b)(4); Ky. R. Civ. P. 26.02(3)(a); La. Code Civ. Proc. Ann. art. 1424(A); Me. R. Civ. P. 26(b)(3); Md. Code Ann., Civ. Proc. § 2-402(d); Mass. R. Civ. P. 26(b)(3); Mich. Ct. R. 2.302(B)(3)(a); Minn. R. Civ. P. 26.02(d); Miss. R. Civ. P. 26(b)(3); Mo. Sup. Ct. R. 56.01(b)(3); Mont. Code Ann. § 25-20-26(b)(3); Neb. Ct. R. Disc. § 6-326(b)(3); Nev. R. Civ. P. 26(b)(3); N.H. Super. Ct. R. 36(b)(2); N.J. Ct. R. 4:10-2(c); N.M. Dist. Ct. R. Civ. P. 1-026(B)(5); N.Y. Civ. Practice Law § 3101(d)(2); N.C. Gen. Stat. § 1A-1, R. 26(b)(3); N.D. R. Civ. P. 26(b)(4); Ohio R. Civ. P. 26(b)(3); Okla. Stat. Ann. tit. 12, § 3226(B)(4); Or. R. Civ. P. 36(B)(3); Pa. R. Civ. P. 4003.3; R.I. R. Civ. P. 26(b)(3); S.C. R. Civ. P. 26(b)(3); S.D. Codified Laws § 15-6-26(b)(3); Tenn. R. Civ. P. 26.02(3); Tex. R. Civ. P. 192.5; Utah R. Civ. P. 26(b)(4); Vt. R. Civ. P. 26(b)(3); Va. Sup. Ct. R. 4:1(b)(3); Wash. Super. Ct. Civ. R. 26(b)(4); W. Va. R. Civ. P. 23(b)(3); Wis. Stat. § 804.01(2)(c); Wyo. R. Civ. P. 26(b)(3)).

identical to" Federal Rule 26(b)(3)); *McKinnon v. Smock*, 336 N.W.2d 197 (Iowa 1983) (Iowa's work product discovery limitations are the same as those pursuant to Federal Rule 26(b)(3)); *Kelch v. Mass Transit Admin.*, 400 A.2d 440, 446 (Md. 1979) (Maryland's privilege is "substantially similar to" Federal Rule 26(b)(3)).

Because of such similarities, state courts routinely look to the federal courts' interpretations of Federal Rule 26(b)(3) for guidance when interpreting the state's work product privilege. *See, e.g., Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1203 n.25 (2009) (because the Massachusetts and Federal work product privileges are identical in all material respects "[i]t is therefore appropriate to look for guidance to Federal interpretations of the Federal rule."); *In re Grand Jury Subpoena for Documents in the Custody of Bekins Storage Co.*, 460 N.Y.S.2d 684, 689 (1983) (because the federal privilege "is the substantial equivalent of the New York work-product rule * * * Federal cases which apply the work-product exemption to Grand Jury proceedings are persuasive precedent."); *Adler v. Shelton*, 778 A.2d 1181, 1187 (N.J. 2001) ("Since [the New Jersey rule] is a carbon copy of [the federal privilege] it is appropriate to look to federal decisions for guidance." (citation omitted)); *Painter v. Peary*, 451 S.E.2d 755, 758 n.6 (W. Va. 1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases * * * in determining the meaning and scope of our rules" (citations omitted)); *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So. 2d 125, 131 n.10 (La. 1983) (because the Louisiana work-product standard is the same as the federal standard, "federal decisions construing Rule 26(b)(3)

are persuasive authority."); *Downing v. Bowater, Inc.*, 846 S.W.2d 265, 268 (Tenn. Ct. App. 1992) (the Tennessee and Federal work-product privileges "are sufficiently similar that interpretation of the Federal Rule by the Federal Courts is persuasive authority for our interpretation of the Tennessee Rule."); *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1254 (Ind. Ct. App. 1990) (Indiana courts "will consult federal precedent although not bound by it because of the similarity of our rules with the Federal Rules of Civil Procedure."); *Ashmead v. Harris*, 336 N.W.2d 197, 199 (Iowa 1983) (because the Iowa work product privilege "is modeled on Fed. R. Civ. P. 26(b) * * * the history and cases under the federal rule provide guidance in interpreting the Iowa counterpart."); *Soter v. Spokane Sch. Dist. No. 81*, 174 P.3d 60, 73 (Wash. 2007) ("Where a state rule is identical to its federal counterpart, analyses of the federal rule provide persuasive guidance as to the application of our comparable state rule."); *Gold Standard, Inc. v. Am. Barrack Res. Corp.*, 805 P.2d 164, 168 (Utah 1990) ("In construing our rule, we freely refer to authorities which have interpreted the federal rule."); *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373, 374 (Fla. Dist. Ct. App. 2004) ("federal decisions [are] persuasive authority because Florida's * * * work product privilege is substantially similar to the federal rule" (citations omitted)).

Making matters even more unpredictable for litigants, state courts rarely limit themselves only to federal decisions from the circuit covering that state; more often, the state courts look to the interpretations of federal courts from several circuits. *See, e.g.*, *Crowe Countryside Realty Assoc. v. Novare Eng'rs, Inc.*, 891 A.2d 838 (R.I. 2006) (Rhode Island work product

decision in which the court relies on guidance from the Third and Sixth Circuits); *Gall v. Jamison*, 44 P.3d 233 (Colo. 2002) (Colorado work product decision in which the court relies on guidance from the Seventh, Fourth, and Tenth Circuits); *Gold Standard, Inc. v. Am. Barrack Res. Corp.*, 805 P.2d 164 (Utah 1990) (Utah work product decision in which the court relies on guidance from the Fifth, Seventh, Ninth, and the D.C. Circuits).

Accordingly, the circuit split exacerbated by *Textron*'s new "for use in" test will wreak havoc in state court litigation. A party seeking the production of documents will most certainly rely on *Textron*'s new "for use in" standard, while a party seeking protection will likely rely on decisions such as *United States v. Adlman*, 134 F. 3d 1994 (2d Cir. 1998), or *In re Grand Jury Subpoena*, 357 F.3d 900 (9th Cir. 2004), for the more inclusive "because of" test.[4] As a result, litigants will face uncertainty in each jurisdiction until the highest court in each of the fifty states considers and addresses the scope of the work product privilege in light of the new "for use in" standard adopted by the First Circuit.

This risk is even more obvious with regard to matters arising within the First Circuit states (Maine,

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[4] With regard to tax accrual workpapers, the split in decisions between Fifth Circuit's "primary purpose" test and the majority of circuits' "because of" test was not particularly troubling to the business community because "the result [for tax accrual workpapers] is the same regardless of which test the court applies." *Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008).

Massachusetts, New Hampshire, and Rhode Island) because the highest courts of three of those states currently employ the "because of" standard. *See, e.g.*, *Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1203-04 (Mass. 2009); *Springfield Terminal Ry. Co. v. Dep't of Transp.*, 754 A.2d 353, 357-359 (Me. 2000); *Henderson v. Newport County Reg'l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009). Since *Textron*, however, decisions from the highest court in each Maine, Massachusetts, and Rhode Island—which are binding on the state's lower courts—are in direct conflict with the interpretation of Federal Rule 26(b)(3) enunciated in *Textron*.

In fact, *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009), addressed facts quite similar to the facts in *Textron*. There, the Massachusetts Supreme Judicial Court determined that the state's work product privilege prevented the compelled disclosure of the documents at issue. *Comcast* involved a Massachusetts tax audit during which the Massachusetts Department of Revenue examined whether the gain from a particular transaction was properly reflected on Comcast's Massachusetts tax returns and sought the production of documents relating to the transaction. Comcast provided some documents but withheld others claiming that they were protected by the state's work product privilege. The withheld documents had been prepared by accountants at the request of one of Comcast's in-house attorneys and provided "a detailed analysis of Massachusetts tax law and an outline of the feasibility of the potential restructuring in light of applicable Massachusetts law and the potential for [Massachusetts Department of Revenue] litigation." 901 N.E.2d at 1205 (internal quotations omitted).

Relying on the First Circuit's now-vacated decision in *United States v. Textron Inc. & Subsidiaries*, 553 F.3d 87 (1st Cir. 2009) (vacated and replaced by the decision at issue here), for the proposition that the "work product doctrine protects tax accrual workpapers where [the] 'function of the documents was to analyze litigation,'" the Massachusetts Supreme Judicial Court determined that the *Comcast* documents were prepared "'because of' the reasonable possibility of litigation with the [Massachusetts Department of Revenue]." *Comcast Corp.*, 901 N.E.2d at 1205.

Even though *Comcast* reflects the Massachusetts Supreme Judicial Court's interpretation of the scope of the Massachusetts' work product doctrine, members of the business community fear that the Massachusetts Department of Revenue will argue that documents similar to those protected from disclosure in *Comcast* are now discoverable under the revised *Textron* standard.[5] In response, Massachusetts businesses can be expected to assert that those documents continue to be protected, relying on Massachusetts Supreme Judicial Court precedent in *Comcast*. Consequently, taxpayers in litigation with the Massachusetts Department of Revenue are almost guaranteed

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[5] The business community is hopeful that state departments of revenue will be fair and reasonable and will approach discovery in an even-handed manner. Thus, if claiming that the "for use in" standard applies for purposes of the taxpayer's discovery responses, one would hope the state department of revenue would produce any of its documents that failed to meet the new, stricter standard. But without guidance from this Court, such evenness seems highly unlikely.

protracted discovery battles regarding the scope of the work product doctrine.

II. *Textron*'s Narrower Test Will Result in the Involuntary Waiver of Otherwise Valid Claims of Work Product Privilege in Many Jurisdictions.

With different tests for determining when a document is prepared "in anticipation of litigation," the same document may fail the First Circuit's test and not qualify for protection there but may satisfy another jurisdiction's test and be protected in that second jurisdiction. *Compare, e.g., Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008) (Federal Rule 26(b)(3) applied to tax accrual workpapers) *with Textron* (Federal Rule 26(b)(3) did not apply to tax accrual workpapers). As a result of the differing treatment, the work product privilege protection that applies to a document in, say, the Eleventh Circuit, would be waived if a litigant was required to provide such document to an adversary in the First Circuit. *See, e.g., United States v. Mass. Inst. Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) ("disclosure to an adversary, real or potential, forfeits work product protection"). In effect, the First Circuit's test could result in waiver in other jurisdictions and render the standards in those jurisdictions virtually meaningless when a litigant is involved in multi-jurisdictional litigation.

This is a significant concern for businesses operating in multiple jurisdictions because it is quite common for the tax effect of a single transaction or structure to be litigated in multiple jurisdictions and,

thus, the same documents would be relevant in several separate cases. For example, one company separately litigated the issue of whether physical presence was required for it to be subject to the state's taxing authority in Massachusetts, Louisiana, Oklahoma, and South Carolina. *Geoffrey, Inc. v. Comm'r of Revenue*, 899 N.E.2d 87 (Mass.), *cert. denied*, 129 S. Ct. 2853 (2009); *Bridges v. Geoffrey, Inc.*, 984 So. 2d 115 (La. Ct. App.), *writ denied*, 978 So. 2d 370 (La. 2008); *Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.3d 632 (Okla. Ct. App. 2005); *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993). Another company separately litigated the issue of whether gain from the sale of a subsidiary was apportionable or allocable in New Jersey, New York City, and New York State. *Matter of Allied-Signal, Inc. v. Tax Appeals Tribunal*, 675 N.E.2d 1234 (1996); *Bendix Corp. v. Director*, 592 A.2d 536 (N.J. 1991), *reversed*, 504 U.S. 768 (1992); *Matter of Allied-Signal, Inc. v. Comm'r of Fin.*, 588 N.E.2d 731 (N.Y. 1991). And another company separately litigated the issue of whether sales of certain securities were to be included in the sales factor denominator of its apportionment factor in Oregon, Tennessee, and Indiana. *Sherwin-Williams Co. v. Dep't of Revenue*, 996 P.2d 500 (Ore. 2000); *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1998); *Sherwin-Williams Co. v. Indiana Dep't of State Revenue*, 673 N.E.2d 849 (Ind. Tax Ct. 1996).

Thus, there is a high likelihood that a particular document reflecting attorneys' mental impressions will be relevant in multiple jurisdictions. The involuntary waiver caused by production of a document in a "for use in" jurisdiction will destroy otherwise legitimate work product claims in other jurisdictions.

Moreover, the Internal Revenue Service has entered into information sharing agreements with all or most of the states, and many state departments of revenue have entered into information sharing agreements with each other. Derick Brannan, "Federal, State Information-Sharing Agreements Raise Issues of Concern for Taxpayers," 2004 Tax Management Weekly Tax Report 37 (Sept. 10, 2004) (noting that at least forty-seven states entered into information sharing agreements, called Memorandums of Understanding, with the Internal Revenue Service and that at least forty-four states entered into information sharing agreements with each other). As a result, providing a document that fails the "for use in" test to one tax agency because the work product privilege does not apply could result in that document being provided to other tax agencies in jurisdictions where the document would have been protected under the "because of" test (but for the production in the "for use in" jurisdiction).

Resolving the question presented is thus clearly necessary to prevent the First Circuit decision in *Textron* from cannibalizing the widely-accepted and long-standing work product privilege decisions in other circuits and in the states.

CONCLUSION

For the reasons stated above, and for the reasons identified by petitioner, this Court should grant the petition for a write of certiorari.

Respectfully submitted.

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TEXTRON INC. AND SUBSIDIARIES, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONERS

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JANUARY 27, 2010

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONERS

DRI—the Voice of the Defense Bar respectfully submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, skills, and effectiveness of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

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[1] Pursuant to Rule 37.2(a), the parties' counsel of record were notified ten days prior to the due date of the intention to file this brief. Petitioners have filed with the Clerk of the Court a blanket letter consenting to the filing of this brief, and a copy of a letter consenting to the filing of this brief by respondent has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

To promote these objectives, DRI participates as amicus curiae in cases, such as this one, that raise issues of fundamental import to its membership and the judicial system. Preservation of a strong work product privilege is one of DRI's greatest concerns. That privilege is absolutely necessary to facilitate frank and open communications between attorneys and their clients, and to ensure effective and thorough representation.

The judgment below, which deepens an already existing circuit conflict, adopts a narrow view of the work product privilege. Not only is this contrary to guidance from this Court, but if left standing, the decision will have a deleterious effect on the attorney-client relationship and on the quality of advice that attorneys impart, especially to corporations.

SUMMARY OF ARGUMENT

The work product privilege, first recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, serves a vital role in our judicial system.

This privilege protects from discovery documents that "are prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A). The privilege promotes effective legal advocacy by permitting attorneys to have candid and confidential communications with their clients and to fully explore and analyze all aspects of a case or a potential case. The court of appeals below adopted a narrow standard for the work product privilege, protecting from discovery only those documents created "for use" in litigation.

A. The issue in this case, which the court below acknowledged has not been addressed by this Court, is of profound importance to DRI and its members who draft legal strategy on a daily basis. The effect that narrow work product protection has on the legal profession is at odds with the principles underlying the privilege, and it undermines the ability of attorneys to provide effective legal advice to their clients.

DRI's members regularly rely on the work product privilege when preparing for litigation, and this Court has long recognized that the work product privilege serves the legal profession by permitting attorneys to diligently prepare a case and advise their

clients without fear of interruption by adverse parties. When there is doubt about what protection an attorney's preparatory materials will receive, however, the quality of case preparation and client counseling declines. Attorneys will be wary of memorializing in writing broad litigation strategies or risk analyses in advance of suit for fear that their work product will end up in the hands of opposing counsel.

Inadequate protection for work product will, in particular, have a deleterious effect on the manner in which corporations assess risk. Attorneys play an increasingly vital role in modern corporate culture, as corporations look to them for advice relating to both legal and business matters. The quality of an attorney's advice, and consequently the wisdom of the business decisions made by corporations, relies heavily on an attorney's ability to conduct and put in writing thorough analyses and to be completely candid with decisionmakers within the corporation. Only rigorous protection of these processes can ensure the success of important corporate activities, such as internal corporate investigations and corporate risk assessments. Weak attorney work product protection will force attorneys to temper their opinions and candor because documentation may wind up in the hands of adversaries. This harms not only the corporation, but also society's interest in corporate accountability.

B. Ten courts of appeals have articulated at least three different standards as to when documents

containing attorney opinions and analyses are privileged under Rule 26(b)(3)(A). This conflict in the courts of appeals creates significant uncertainty as to when documents containing an attorney's opinions or mental impressions are subject to discovery. The divergent standards used by the courts of appeals to determine whether documents, including those containing attorneys' mental impressions and legal analyses, are entitled to work product protection further undermines the ability of attorneys to completely fulfill their role as counselors and advisors. This Court should grant review to clarify the proper scope of work product protection and thus restore the ability of attorneys to fully discharge their role in our judicial system.

ARGUMENT

THE RULING BELOW INADEQUATELY PROTECTS ATTORNEY WORK PRODUCT FROM DISCOVERY AND CONFLICTS WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS

This Court has long recognized that the judicial system depends on effective legal advocacy which, in turn, relies on the ability of attorneys to have candid and confidential communications with their clients. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) ("the general policy against invading the privacy of an attorney's course of preparation is * * * well recognized and * * * essential to an orderly working of our system of legal procedure"). In recognizing the work product privilege, this Court held that the production

of materials created in anticipation of litigation should be "rare." *Id.* at 513; *see also Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981) (noting the high standard that should be met before compelling disclosure of work product materials). These documents contain attorney thought processes on the merits of a case, including the strengths and weaknesses of potential and ongoing litigation.

As the court of appeals acknowledged, its ruling addressed a question that this Court has yet to answer: whether "a document [that] is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation" is discoverable under Rule 26(b)(3)(A). Pet. App. 9a. This is an important question to the everyday practice of law, and the court of appeals applied a standard that inadequately protects attorney work product and that is contrary to the decisions of other circuits. This Court's review is warranted.

A. If Left Standing, The Narrow "For Use" Standard Adopted By The Court Below Will Have Broad Negative Effects On The Workings Of The Judicial System

The district court in this case held that the documents at issue "were prepared 'because of' the prospect of litigation" and were therefore not discoverable under Rule 26(b)(3)(A) because they had been "prepared in anticipation of litigation." Pet. App. 9a. The court of appeals reversed that ruling, observing that "the district court did not say that

the work papers were prepared *for use* in possible litigation." Pet. App. 11a (emphasis in original). The court of appeals reasoned that "the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated." Pet. App. 15a.

The court below thus held that the relevant inquiry is whether the document was created "for use" in litigation. Pet. App. 11a. And a document that was not created "for use" in litigation is discoverable even if "the subject matter of the document relate[d] to a subject that might conceivably be litigated," Pet. App. 16a (emphasis omitted), or "the materials were prepared by lawyers or represent legal thinking," *id.* at 17a. If not reversed, the ruling will have "wide ramifications" affecting issues "essential to the daily practice of litigators across the country." Pet. App. 33a, 45a (Torruella, J., dissenting).

The effect of the ruling is far reaching. If an adverse party can have access to his adversary's critical legal analyses, attorneys on both sides of a case are less capable of zealously performing their duties. And when a client has no assurance that his attorney's analyses will not be discoverable by his adversary, a client is less likely to be forthright with his attorney. Providing parties access to the fruits of their opponents' legal analyses thus undermines the adversarial nature of our judicial system.

1. A narrow work product privilege limits the ability of attorneys to provide effective representation to their clients

DRI's members are committed and known for their zealous representation of their clients. This is consistent with the Model Rules of Professional Conduct requirement that attorneys must act "with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2009). Courts have thus recognized that the Model Rules "facilitate[] zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party." *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2001). As discussed below, however, the court of appeals' ruling, by limiting attorneys' ability to document their thinking, hinders the ability of DRI's members to provide zealous representation. Where there is a significant possibility that work product containing potential litigation strategies and risk assessments will be discoverable, attorneys will feel less free to fearlessly consider all potential avenues relevant to their client's case.

a. DRI's members regularly rely on the work product privilege when preparing for litigation or the possibility of litigation. As this Court has recognized, and as DRI's members experience on a daily basis, the practice of committing strategy and mental impressions to paper strengthens attorneys' preparation by assuring precision and thoroughness

before attorneys impart advice to their clients. *See Hickman*, 329 U.S. at 511. The work product privilege obviates concerns that their written legal analyses about the merits (or demerits) of a particular case or potential case might be subject to discovery.

But if only those documents that are created "for use" in litigation are protected by the work product privilege, attorneys on both sides of a case cannot thoroughly and aggressively prepare. Under such a regime, attorneys, who often must opine on the legal consequences of past or future business decisions, will be reticent to memorialize these legal analyses or thoughts about the merits or strategies of a particular issue or course of action because such documents might end up in the hands of opposing counsel in a subsequent suit. Indeed, this Court has acknowledged that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Ibid.*; *see also Restatement (Third) of the Law Governing Lawyers* § 87 cmt. b (2000) (*Restatement*) ("A lawyer whose work product would be open to the other side might forgo useful preparatory procedures, for example, note-taking."). Such a result runs contrary to the professional standards by which DRI's members abide, which assume that an attorney will "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 511;

Pet. App. 32a (Torruella, J., dissenting) (explaining the "diminishing * * * quality of representation" that would result were attorneys discouraged to put information in writing). This will limit creative thinking by attorneys, who will feel constrained in their ability to examine all possible solutions to a problem, which in turn will hinder the advancement of the law.

This Court in *Hickman* recognized the potential problem that could result if "[a]n attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." 329 U.S. at 511; *see also id.* at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."). Without the work product privilege, parties will have an "incentive * * * to rely solely on their opponent's preparation." *United States v. Nobles*, 422 U.S. 225, 254 n.16 (1975); *see also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir.) ("The purpose of the doctrine is to * * * prevent one party from piggybacking on the adversary's preparation.") (citation omitted), *cert. denied*, 549 U.S. 1096 (2006); *cf. Restatement* § 87 cmt. b (noting that our adversarial process depends upon "opposing lawyers competitively develop[ing] their own sources of factual and legal information").

The standard announced by the court below will permit this very type of freeloading. Indeed, the

plaintiffs' bar has every incentive to seek out this type of analyses in courts that have taken a narrow view of the work product doctrine. *See, e.g.*, Matthew J. Barrett, *Opportunities for Obtaining and Using Litigation Reserves and Disclosures*, 63 OHIO ST. L. J. 1017, 1027 (2002) (detailing ways in which practitioners may access sensitive legal strategy documents). As one commentator has noted, recent legal developments permitting broader access to work product materials "present both important discovery opportunities for litigators, especially counsel for plaintiffs, and dangerous pitfalls for attorneys representing businesses" because these work product materials include legal planning and strategy documents kept by businesses. *Id.* at 1081.

b. In this atmosphere—where DRI's members must avoid opportunistic litigators who would attempt to obtain sensitive documents imparting litigation strategies—clear guidance as to the scope of work product protection is vital.

The standard adopted by the court below, however, provides attorneys with virtually no guidance. Instead, the court simply asserted a know-it-when-you-see-it test: "[e]very lawyer who tries cases knows the touch and feel of materials prepared *for* a current or possible (*i.e.*, 'in anticipation of') law suit." Pet. App. 17a (emphasis added). But that formulation leaves experienced litigators guessing as to what is protected. On the one hand, if the standard protects only those materials that will actually be "use[d]" at trial, it is too narrow to serve

the interests the Rule is meant to protect. And if the standard is meant to protect more than just those materials, it is uncertain how much more. For example, would a lawyer's analysis of a potential expert's report regarding an industrial accident be privileged, or would the answer depend on *when* (before versus during litigation) and for *what* reasons (because the expert might be a witness versus because the client was trying to prevent future accidents) the analysis was created? Without more certainty, DRI's members, who have daily, on-the-ground experience with this issue, cannot rely on such a know-it-when-you-see-it test, especially when the consequences of being wrong are the disclosure of significant legal analyses that can be manipulated by opposing counsel.

The standard announced by the court of appeals will have broad ramifications. Although this case arises in the factual context of tax accrual work papers, the reasoning below suggests no principled basis on which its ruling could be limited to that context. To the contrary, the court of appeals' opinion interpreted Rule 26 and this Court's precedent to articulate a narrow standard of protection for attorney work product. Pet. App. 15a-20a. And in applying that standard, it did not tailor it to the facts of this particular case. Pet. App. 11a-15a. The opinion below therefore indicates that its narrow work product standard applies in all civil cases.

c. Nor are these concerns about the disclosure of written materials containing attorney impressions

inchoate or theoretical. If left standing, the decision below will negatively affect the ability of the clients of DRI's members to assess litigation risks and conduct internal investigations.

As this Court has explained, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations * * * 'constantly go to lawyers to find out how to obey the law.'" *Upjohn*, 449 U.S. at 392 (citation omitted); *see also* Pet. App. 34a (Torruella, J., dissenting) ("Nearly every major business decision by a public company has a legal dimension that will require [legal] analysis"); Louis M. Brown et al., *The Legal Audit: Corporate Internal Investigation* § 1.1 (2003) (explaining that attorneys, rather than business executives, should be tasked with recognizing legal problems for a corporation). But without sufficient assurances that these risk assessments and internal investigations will not be discoverable, both attorneys and clients will be less likely to fully examine and memorialize the potential consequences of any corporate action.

i. Corporations, in fact, often are required to assess litigation risk. In certain situations, for example, Financial Accounting Standard No. 5 (Accounting for Contingencies) requires a company to assess potential liabilities. *See* Fin. Accounting Standards Bd., *Statement of Fin. Accounting Standards No. 5* (1975) (*SFAS 5*); *see generally* Barrett, *supra*, 1032-1047. These required assessments apply to liabilities arising from a wide range of activities,

such as product liability exposure, pending litigation, patent claims, and governmental investigations. *SFAS 5* at App. A. These requirements place corporations and attorneys in the perverse position of being compelled to conduct analyses in order to comply with federal law, while simultaneously risking that the analyses will eventually be discovered by adverse parties. *See* Ronald L. Buch, *The Touch and Feel of Work Product*, 124 TAX NOTES 915 (2009). "[N]othing in the policies underlying the work-product doctrine or the text of the Rule itself * * * justif[ies] subjecting a litigant to this array of undesirable choices." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

Indeed, the government, and the IRS in particular, is acutely aware of the important role that these risk assessments serve in corporate governance, and have argued that these types of documents should be protected as work product. In *Delaney, Migdail & Young v. Internal Revenue Service*, 826 F.2d 124 (D.C. Cir. 1987), the IRS was considering implementation of "a system of statistical sampling to audit large accounts." *Id.* at 125. To assess the wisdom of such a system, IRS attorneys analyzed the potential effects of the system and memorialized this analysis in memoranda that "advise[d] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Id.* at 127. When these documents were sought in a Freedom of Information Act request, the IRS

advocated a broad reading of the work product privilege to prevent disclosure of these materials. The D.C. Circuit granted protection to the documents. explaining that the plaintiff was "seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure [that the plaintiff did] not miss anything" in preparing its own case. *Ibid.* Yet the documents the IRS sought to shield from discovery in that case are the very type of documents that it now seeks to obtain through discovery in this case. *See* Pet. App. 20a (noting that Textron's workpapers would provide the IRS with "a blueprint to Textron's possible improper deductions"). As the D.C. Circuit noted in affording protection to the IRS documents, "[t]his is precisely the type of discovery the Court refused to permit in *Hickman*." *Delaney*, 826 F.2d at 127.

ii. Moreover, internal investigations have become a regular practice in corporations throughout the Nation, and the use of counsel in these investigations has become standard practice. Brown, *supra*, § 4:1; *see also* Am. College of Trial Lawyers (ACTL), *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 73 (2009) (noting the high number of internal investigations that public companies have recently conducted with the use of outside counsel). Corporations conduct investigations for a wide range of issues, ranging from small employment matters to potential violations of antitrust, environmental, or securities laws. ACTL,

supra, at 73. Indeed, in response to recent changes in securities laws, such as those introduced by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245, the Securities and Exchange Commission has promulgated rules that require attorneys to report material corporate violations of securities laws. *See* 17 C.F.R. § 205.3(b)(1). By definition, whether a violation is material enough to warrant reporting depends upon "a prudent and competent attorney['s]" analysis of the evidence. *Id.* § 205.2(e). Thus, discovery of these violations and the concomitant ability to comply with federal law is entirely dependent on the ability of attorneys to conduct thorough internal investigations in which they can document all of their findings and assure client candor. Society benefits from these investigations, as corporations use them to determine what action they should take to remedy any possible illegalities and to better serve the interests of their shareholders. To that end, society has an interest in a thorough investigation in which attorneys and other investigators feel free to fully explore and analyze any potential improprieties.

But internal investigations are often followed by external investigations by a government agency and/or by civil and criminal proceedings. ACTL, *supra*, at 76. The prospect of future litigation affects how DRI's members can conduct internal investigations, especially when there is a possibility that a narrow work product privilege could lead to discovery of some documents arising from that investigation.

Ibid. Under a narrow work product privilege, counsel must "anticipate that all documents created, facts uncovered, and witness statements made to them" could end up in the hands of the government or a private plaintiff. *Ibid.* Even when document creation is necessary, DRI's members may well omit information that otherwise might be included in a document, to the detriment of the critical and candid assessment that should be the desired result of any internal investigation. *Ibid.* This "cautious behavior" results in "an investigation which will accomplish only minimally the purposes for which it was instituted." Brown, *supra*, § 9:2.

Corporations attempting to be model corporate citizens should not be penalized for taking steps toward that goal. But that is precisely what is occurring as corporations and experienced attorneys are starting to view internal investigations as "extremely dangerous" undertakings due to the possibility that internal investigation documents once thought to be protected may now be discovered. *Id.* § 9:1.

2. *The zealous representation of clients relies on the candor between client and counsel, which is threatened by the ruling below*

The ability to assert work product protection over legal analyses and opinions also encourages candor between client and counsel. It is only through this candor that an attorney has the necessary

information to zealously formulate potential legal strategies often memorialized in memoranda or other documents. But if these documents are discoverable by adverse parties, clients will have reservations about fully disclosing information to their attorneys. *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (noting the "obvious" "'chilling effect' that [a weakened work product privilege] will have on the truthful communications from the client to the attorney"). As a result, the attorney's contribution to the case, and to the advancement of the judicial process as a whole, will be undermined. *Upjohn*, 449 U.S. at 389 ("full and frank communication between attorneys and their clients * * * promote[s] broader public interests in the observance of law and administration of justice").

3. A narrow work product privilege disrupts the adversarial system by increasing the likelihood attorneys will be deposed or called to testify at trial and will be disqualified

Permitting the discovery of work product distorts the adversarial system by also increasing the possibility that a party's litigation counsel will be called as a witness or deponent to explain the facts or analysis contained in the documents. Indeed, it was due to these concerns that Justice Jackson recognized that preventing this practice was a reason to interpret broadly the work product privilege. *Hickman*, 329 U.S. at 517 (Jackson, J., concurring); *see also Restatement* § 87 cmt. b (explaining that the

work product privilege "reduces the possibility that a lawyer would have to testify").

DRI's concern in this regard is well founded. The American College of Trial Lawyers has warned that, as a result of decisions like the one by the court of appeals here, "[i]nvestigating lawyers should be aware that they could become witnesses in a criminal or civil proceeding." ACTL, *supra*, at 93. And the ruling below will exacerbate issues already faced by courts about when an attorney can be compelled to testify concerning work product information. The Eighth Circuit, for example, confronted this issue in *Shelton*, where the district court had issued a default judgment as a sanction against American Motors Corporation when one of its in-house counsel refused to testify, on work product grounds, about the existence of corporate documents. *Shelton*, 805 F.2d at 1326. In contrast to the ruling below, the Eighth Circuit reversed on work product privilege grounds and held that the attorney need not testify about the documents. *Id.* at 1327. The court explained that taking such a deposition "disrupts the adversarial system and lowers the standards of the profession [and] adds to the already burdensome time and costs of litigation." *Ibid.* This practice, the court explained, "detracts from the quality of client representation [because an attorney cannot] devote his or her time and efforts to preparing the client's case without fear of being interrogated." *Ibid.*

Not only is an attorney's ability to zealously represent his client in litigation undermined when he

must provide testimony, but when a party's attorney is identified as a witness there often is an accompanying motion to disqualify that attorney from the case. Model Rules of Prof'l Conduct R. 3.7 ("[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"); *see also FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1317 (5th Cir. 1995) (disqualifying an attorney on request of defendant who indicated an intent to call the attorney as a witness); *Ramey v. District 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 283 (2d Cir. 2004) ("the remedy where an attorney is called to testify may be to disqualify the attorney in his representational capacity"). Thus, the client might be deprived of counsel of choice, including the case knowledge and strategy that lawyer has accumulated over the course of the representation.

B. Review Is Necessary Because The Division In The Courts Of Appeals As To When The Work Product Privilege Applies Creates Uncertainty That Negatively Affects The Everyday Decisions Of Attorneys And Their Clients

The decision below exacerbates an already existing conflict in the circuits in an area critical to the everyday practice of law. The existence of these divergent legal standards has an adverse effect on the advice that attorneys can provide and that clients can request. Due to this division in the courts of appeals, DRI's members face enormous difficulties in how they

analyze their clients' potential and current litigation matters, which often involves significant case planning and strategy, because they fear that these analyses might be discoverable by opposing parties. As this Court has recognized, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

As the court below acknowledged, its ruling conflicts with decisions of other federal courts. Pet. App. 18a. All told, ten courts of appeals have adopted what amounts to more than three divergent standards as to the circumstances in which a document prepared in anticipation of litigation is privileged as attorney work product under Rule 26(b)(3). As the petition makes clear (Pet. 12-20), a division of this magnitude alone warrants this Court's plenary review.

Eight other courts of appeals apply some formulation of the standard applied by the district court in this case, which the court of appeals below rejected. These eight courts all have held that the relevant inquiry under Rule 26(b)(3)(A) as to whether a document was created "in anticipation of litigation" is whether the documents in question were created "because of" the prospect of litigation. *See United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th

Cir. 2003); *Adlman*, 134 F.3d at 1202; *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Senate of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 587 n.42 (D.C. Cir. 1987) (R.B. Ginsburg, J.); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-1119 (7th Cir. 1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979). Under this "because of" standard, these circuits afford work product protection to a document if it "would not have been prepared in substantially similar form but for the prospect" of litigation, without regard to whether the document would itself actually be used in the litigation. *Adlman*, 134 F.3d at 1195.

The Fifth Circuit has adopted yet a third standard. *See United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). Under that court's precedent, for a document to have been created "in anticipation of litigation," a court must determine whether the primary motivation behind the document's creation was the prospect of litigation. *Id.* at 542-543.

Thus, in jurisdictions such as the Fifth Circuit or, now, the First Circuit, documents with attorney opinions or analyses are more likely to be discovered. *Adlman*, 134 F.3d at 1199-1200; Eric C. McNamar, *Business Planning As It Should Be: Why Adlman Should Be The Standard When Interpreting The Work Product Doctrine*, 34 VAL. U. L. REV. 201, 225-226

(2000). Under the "because of" standard employed by a majority of the courts of appeals, however, such analyses would be protected as work product because that standard recognizes that documents can serve the "dual purpose" of assisting a business decision and anticipating litigation. *Adlman*, 134 F.3d at 1200 ("The fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3)."); *see also Roxworthy*, 457 F.3d at 599; *In re Grand Jury Subpoena*, 357 F.3d at 908 ("The question of entitlement to work product protection cannot be decided simply by looking at one motive that contributed to a document's preparation.").

This ability to discover documents containing attorney analyses and impressions in the few circuits that have adopted a narrow view of the work product privilege will encourage forum shopping, especially since defendant corporations may fall under the jurisdiction of several federal courts of appeals. Large plaintiff class actions, where plaintiffs will not have the same sort of pre-litigation risk assessments, will more likely be filed in courts where the work product privilege is weaker and discovery can uncover litigation risk assessments that occurred before the filing of the suit.

Many of DRI's members thus must assume that the documents they create for their clients will be subject to the most narrow work product privilege set forth in the circuit conflict, even if their clients are located in jurisdictions that might provide greater

protection under Rule 26. Dan K. Webb et al., *Corporate Internal Investigations* § 3.06 (2009 ed.) (explaining that counsel should "[a]ssume any written report may ultimately be released to the public"). Those attorneys and clients who do not assume that a narrow work product privilege standard might apply may find themselves embroiled in discovery disputes over their key litigation strategy documents. And, as discussed above (*see* pp. 7-11 *supra*), counsel that take the more cautious approach and chooses not to memorialize key strategies on paper will often be handcuffed in their ability to provide critical legal advice to their clients.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

New England Legal Foundation ("NELF") respectfully submits this brief as *amicus curiae* in support of petitioner Textron Inc. and Subsidiaries.[1]

STATEMENT OF INTEREST

NELF is a nonprofit, nonpartisan, public interest organization, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses, both public and private, from all parts of New England and the United States.

Because New England is made up of relatively small, contiguous States, many of NELF's members

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amicus curiae* states that petitioner and respondent, upon timely receipt of notice of NELF's intent to file this brief, have consented to its filing. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondent to the filing of this brief has been filed with the Clerk.

regularly conduct business in more than one State in the region. At the same time, the New England States fall within either the First or Second Circuits of the United States Court of Appeals. To the extent that NELF's members are exposed to the risks of litigation or become parties in actual lawsuits, they have a strong interest in consistent application of the Federal Rules of Civil Procedure across the federal jurisdictions in which they conduct business and face either potential or actual litigation.

NELF has regularly appeared as an *amicus curiae* in cases raising issues of general economic and legal significance to the New England business community.[2] For the reasons set forth below, this is such a case, and NELF believes that this brief provides an additional perspective which may aid the Court in determining whether to grant certiorari in this case.

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[2] *See, e.g.*, *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2009); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo* v. *New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P.* v. *San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r* v. *Banks*, 543 U.S. 426 (2005); *Commonwealth* v. *Fremont Inv. & Loan*, 452 Mass. 733, 897 N.E.2d 548 (2008); *Saab* v. *Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564, 897 N.E.2d 548 (2008); *Thurdin* v. *SEI Boston, LLC*, 452 Mass. 436, 895 N.E.2d 446 (2008); *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 893 N.E.2d 1187 (2008); *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008); *Moelis* v. *Berkshire Life Ins. Co.*, 451 Mass. 483, 887 N.E.2d 214 (2008).

SUMMARY OF ARGUMENT

The language of Federal Rule of Civil Procedure 26(b)(3)(A) is unambiguous: "Ordinarily, a party may not discover documents and tangible things that are prepared *in anticipation of litigation* or for trial by or for another party or its representative . . . ." (Emphasis added.) Interpreting that rule, the First Circuit's decision below holds that a corporation's tax reserve litigation assessment documents[3] are not protectable work product because the documents were not prepared for use at trial and were created in response to regulatory requirements that the corporation support and defend its reserve estimates to the auditor. The decision ignores the rule's protection of documents prepared "in anticipation of litigation" and, in so doing, deepens an already-existing split among the courts of appeals over whether documents lawyers create "because of," but not primarily "for use in," litigation are protected work product. The divergent interpretations of Rule 26(b)(3)(A) in the federal courts of appeals described in the petition present a compelling reason for the grant of certiorari. NELF respectfully submits two additional reasons that the Court should grant this petition to resolve the split.

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[3] As the Court is no doubt aware from the both the Petition and the decision below, these documents were prepared by counsel for the petitioner to support the company's decisions regarding the amount of reserves it should maintain with respect to existing and potential litigations. *See* Pet. App. 6a. By definition, these documents consist of the analyses and mental impressions of the petitioner's attorneys. As part of the audit process, these analyses were shown to the company's auditors so that the latter could verify the reasonableness of the reserves. *See id.* 6a-8a.

First, the decision below has created substantial uncertainty that, for purely geographic reasons, is having an immediate, pronounced impact in the six States that make up New England. Maine, Massachusetts, New Hampshire, and Rhode Island are in the First Circuit, and thus federal courts in those States are bound by the decision below. By contrast, Connecticut and Vermont are in the Second Circuit, and their federal courts are bound by a conflicting rule. In addition to the First and Second Circuits' split on the scope of the work product doctrine, there is now also uncertainty regarding New England state courts' future interpretations of their cognate work product rules, since those courts generally look to federal decisions regarding work product for guidance.

Many of NELF's members conduct business in more than one, or even all, of the New England States, and because of the split, the answer to the question whether documents their attorneys have prepared in anticipation of litigation would be protected from discovery now depends entirely on the jurisdiction in which litigation opponents choose to seek them. The divergence of authority in such a compact geographic area encourages forum shopping and chills communications between clients, their attorneys, and their auditors. The Court should not allow this disruptive inconsistency in authority to continue.

Second, the decision below is inconsistent with the plain text of Rule 26(b)(3)(A) and conflicts with the policies that underlie the work product doctrine. Furthermore, because, under applicable case law, Textron's disclosure of its workpapers to its auditors

did not waive any existing work product protection, a reversal of the First Circuit's erroneous ruling would be outcome determinative in this case. The Court should grant certiorari to correct the First Circuit's error and to provide guidance and uniformity to individuals and organizations that face litigation in the federal courts both in New England and in the other parts of the nation.

ARGUMENT

I. The Decision Below Creates An Intolerable Confusion Regarding Work Product Protection In New England.

As the petition explains, the federal courts of appeals are in irreconcilable conflict over the scope of the work product doctrine. *See* Pet. 12-20. The Circuit split hits especially hard in New England, where the Connecticut River, which once served to bind New England commerce, now divides jurisdictions that protect materials prepared "in anticipation of litigation" under Rule 26 from those that disregard this plain language.

For individuals and businesses in Hanover, New Hampshire, such materials are subject to subpoena or discovery in federal court (though not in New Hampshire state courts). Across the River in White River Junction, Vermont, however, a discovery request or subpoena in federal court would not reach such materials (nor would they in Vermont state court). Downstream, however, as the river passes through Massachusetts, a Springfield manufacturer must disclose these same materials in federal court (though not if sued in state court). And still further downstream, in Connecticut, the Rule like a fickle

current reverses again, so that a Hartford employee (as described in case law below) need not disclose such materials (either in federal or state court).

This confusion is not merely inconvenient; it is intolerable. Some corporations operate in all of those locations along the River and throughout New England. Furthermore, the inconsistent and conflicting rules in courthouses separated by relatively few miles create strong incentives for forum shopping and will likely force litigants to conduct business as if the lowest degree of work product protection will prevail. Meanwhile, corporate counsel, today preparing litigation reserve estimates for *any* kind of potential or existing litigation in New England, cannot determine with certainty whether or not Rule 26(b)(3)(A) will protect such work product from disclosure to an adversary. This is because the degree of work product protection afforded such materials will depend *solely* on the jurisdiction in which the corporation is sued, and not on where it is located. *Compare United States* v. *Textron*, Pet. App. 15a (1st Cir. 2009) (en banc) (adopting the "for use in" test), *with United States* v. *Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998) (adopting the "because of" test); *Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. 293, 316, 901 N.E.2d 1185, 1203 (2009) (same); *OneBeacon Professional Partners, Inc.* v. *Ironshore Holdings (U.S.), Inc.*, No. HHDX04CV085019642S, 2009 WL 415623, at *4 (Conn. Super. Ct. Jan. 27, 2009) (same); *see also Riddle Spring Realty Co.* v. *State*, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966) (finding work product protection for documents prepared "with a view to" litigation); *Killington, Ltd.* v. *Lcsh*, 153 Vt. 628, 647-48,

572 A.2d 1368, 1379-80 (1990) (adopting "in anticipation of litigation" standard). In other words, a defendant located in the Second Circuit must disclose materials as required by the different standard set forth in the decision below if it is sued in the First Circuit.

The practical difficulties of the current state of affairs are clear. In the First Circuit, pursuant to the decision below, documents drafted by lawyers because of potential litigation qualify for work product protection only if they are "prepared *for use* in possible litigation." Pet. App. 11a. Thus, tax reserve litigation assessment documents, which "estimate the amount potentially in dispute and the percentage chance of winning and losing," are not protectable because they are prepared "to establish and support the tax reserve figures for the audited financial statements" and not "for use in litigation." *Id.* at 14a, 6a, 15a.

The opposite result prevails in the Second Circuit. In *United States* v. *Adlman*, 134 F.3d 1194 (1998), the Second Circuit confronted a claim of work product protection over similar documents. In *Adlman*, an attorney commissioned an analysis of the tax consequences of a business transaction. Like the documents at issue in this case, the *Adlman* documents made "predictions about the likely outcome of litigation" between the corporation and the IRS. *Id.* at 1195.

According to the Second Circuit, the fact that business considerations precipitated creation of the document was "irrelevant to the question whether it should be protected under Rule 26(b)(3)." *Id.* at

1200. Moreover, the Second Circuit did not even discuss whether the document was prepared for use in litigation, much less suggest that the work product inquiry would turn on that fact. Instead, the court held that "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation," it is protectable work product. *Id.* at 1195.

Although federal court interpretations of Rule 26(b)(3)(A) are not binding on state court interpretations of their cognate provisions,[4] it is nonetheless illustrative of the mischief created by the decision below that the Massachusetts Supreme Judicial Court, sitting less than a mile from the First Circuit courthouse, recently considered the language of the Massachusetts rule, Mass. R. Civ. P. 26(b)(3), and adopted the Second Circuit's "because of" test set out

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[4] States are of course free to craft and interpret their own procedural rules that may differ from those of federal courts, and therefore some difference in procedure between federal and state courts is to be expected. With respect to the work product doctrine, however, the New England States have adopted rules defining the scope of work product protection containing language nearly identical to that of Federal Rule of Civil Procedure 26(b)(3). *See* Conn. Practice Book § 13-3; Me. R. Civ. P. 26(b)(3); Mass. R. Civ. P. 26(b)(3); N.H. Super. Ct. R. 35(b)(2); R.I. R. Civ. P. 26(b)(3); Vt. R. Civ. P. 26(b)(3). Moreover, many of the state court decisions interpreting state rules have relied on federal court precedent precisely to achieve uniformity on this issue between the state and federal systems. *See, e.g., Comcast*, 453 Mass. at 316 n.25, 901 N.E.2d at 1203 n.25 ("Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure is identical in all material respects to the Federal rule. It is therefore appropriate to look for guidance to Federal interpretations of our rule.").

in *Adlman*, rather than the First Circuit's "for use in" test in this case. *See Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. 293, 901 N.E.2d 1185 (2009). In *Comcast*, as a result of a settlement order between the United States Department of Justice and U.S. West, Inc. (a predecessor of Comcast), U.S. West was required to divest itself of certain shares of stock. In considering how to structure the sale in response to this regulatory requirement, in-house counsel commissioned "a memorandum discussing the 'pros and cons of the various planning opportunities and the attendant litigation risks.'" *Id.* at 299, 901 N.E.2d at 1191. In connection with its subsequent investigation of the transaction, the Massachusetts Department of Revenue sought the memorandum through an administrative summons. *Id.* at 294, 901 N.E.2d at 1188. Comcast argued, among other things, that the memorandum was protected work product.

In evaluating Comcast's work product claim, the Supreme Judicial Court expressly adopted the Second Circuit's "because of" test from the *Adlman* case. *Id.* at 316-17, 901 N.E.2d at 1203-04. Even though U.S. West commissioned the memorandum primarily to inform its business decision regarding how to structure its independent legal obligation to divest the stock, the Supreme Judicial Court held that the memorandum was protected work product. "[A] litigation analysis prepared so that a party can make an informed business decision is afforded the protec-

tions of the work product doctrine." *Id.* at 318, 901 N.E.2d at 1205.[5]

A simple hypothetical illustrates the problems arising from the different interpretations of Rule 26(b)(3)(A) in *Adlman*, *Comcast*, and the decision below. Consider the dilemma confronting a lawyer for a public Massachusetts corporation who is asked to help company executives to evaluate a transaction with a company in Vermont that poses novel tax issues. If he prepares a memorandum analyzing those issues, he may share the memorandum with the company's auditors. Under the decision below, the IRS will be able to obtain the memorandum by subpoenaing it in federal court in Massachusetts, and the IRS will likely seek to use the impressions and theories of the lawyer against his client.

If, however, the Massachusetts Department of Revenue decides to open a parallel audit of the state tax consequences of the transactions, the Supreme Judicial Court's decision in *Comcast* (applying a Massachusetts rule with text identical to that in Rule 26(b)(3)(A)) will prevent it from obtaining the memorandum.[6] Notwithstanding the Supreme Judicial Court's holding, a prudent lawyer would have to advise his client that, as a practical and protective measure, he must conform his conduct to the First

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[5] Maine has also adopted the "because of" test. *See Springfield Terminal Ry. Co.* v. *Department of Transp.*, 2000 ME 126, ¶17, 754 A.2d 353, 358 (Me. 2000).

[6] But the decision below might motivate the Massachusetts Department of Revenue to circumvent the Supreme Judicial Court's holding in *Comcast* by encouraging the IRS to open an audit and share the documents it receives.

Circuit's recent interpretation in the case below, since, at any point the Massachusetts court might decide to amend its view to conform to that of the First Circuit. The result may well be that the lawyer would refrain from the discipline of developing his thoughts on paper, or he may decline to share his full analysis with his client.

The problems created by the conflict are not unique to the tax context. If the Vermont company is dissatisfied with the transaction and decides to sue the Massachusetts company, its lawyer will have a professional obligation to consider and exploit the conflict in choosing a forum. As matters now stand, if the Vermont company sues in Vermont or in Massachusetts state court, the memorandum will be protected. If, however, it brings the same claims in federal court in Massachusetts, the Vermont company will be entitled to the memorandum in discovery.[7]

The split in New England, where many companies operate across state boundaries, is likely to chill communications between lawyers and clients and to encourage, indeed require, lawyers to engage in forum shopping. This Court should eliminate such gamesmanship by granting the petition to resolve the split.

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[7] Moreover, in some situations where a plaintiff prefers to remain in Massachusetts state court to protect its own work product under *Comcast*, the split may cause it to forgo meritorious federal claims to avoid a basis for removal to the United States District Court for the District of Massachusetts, which is governed by the decision below. *See* 28 U.S.C. 1441(b).

II. The Decision Below Is Inconsistent With The Text Of Rule 26(b)(3)(A) And the Policies Underlying It.

The fact that the federal courts of appeals (and, as a consequence, potentially the state courts) are in conflict over a significant issue that clients who receive legal advice regularly confront provides a compelling reason for the Court to resolve the conflict. This case provides an ideal vehicle for the Court to do so because the decision below is incorrect and the question presented is likely to be outcome determinative.

By its express terms, Rule 26(b)(3)(A) protects from discovery documents "prepared in anticipation of litigation or for trial," absent a showing of substantial need. The First Circuit's "for use" test is inconsistent with the plain text of the rule because it ignores the protection expressly afforded documents "prepared in anticipation of litigation." As the dissent below explained, "[t]here is no reason to believe 'anticipation of litigation' was meant as a synonym for 'for trial.'" Pet. App. 28a. Therefore "the term 'anticipation of litigation' should not be read out of the rule by requiring a showing that documents be prepared for trial." *Id.*

The decision below also frustrates the policies underlying work product immunity that were first articulated in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The IRS has unfettered access to the facts necessary for it to audit Textron's return and to form its own conclusions about the propriety of Textron's reporting. The IRS, in subpoenaing Textron's litigation tax reserve estimate workpapers (spreadsheets,

supportive e-mails and notes), is instead seeking the mental impressions of its attorneys, including assessments of the likelihood and possible outcomes of litigation. These documents disclose confidential attorney judgments concerning facts, law, and adversarial priority and strategy. These judgments are the essence of what *Hickman* and Rule 26(b)(3) were designed to protect, and disclosure of these attorney judgments would give an adversary an unfair advantage in settlement negotiations, in its pre-trial budgeting, and in its own trial risk assessment.[8]

The decision below placed great weight on the fact that Textron had prepared the documents in part for disclosure to its auditors pursuant to regulatory requirements applicable to public companies. *See* Pet. App. 11a-15a. The panel's reliance on disclosure to Textron's auditors conflated two distinct inquiries: whether a document is protectable work product and whether that protection has been waived by disclosure to a third party. A recent decision from a New England state court illustrates the correct analysis of disclosure to third parties. In *OneBeacon Professional Partners, Inc.* v. *Ironshore Holdings (U.S.), Inc.*, No. HHDX04CV085019642S,

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[8] The First Circuit in the decision below relied in part on the ground that disclosure was appropriate and desirable because of the the difficulties the IRS faces in tax administration. *See* Pet App. 20a. NELF respectfully submits that any disadvantages the IRS confronts in litigation should not be remedied through judicial rewriting of Rule 26(b)(3). The work product doctrine applies to litigants contesting issues far removed from taxation, including the work of attorneys for individuals with workaday legal problems, just as it applies to the work of attorneys for large corporations seeking to minimize their tax burden.

2009 WL 415623, at *1 (Conn. Super. Ct. Jan. 27, 2009), an individual employed by an insurance business sought legal advice about claims his employer might assert against him if he joined another insurance firm, Ironshore. He received from his attorney several memoranda analyzing those claims, and he shared the memoranda with Ironshore. *See id.* at *4. His original employer sought production of the memoranda in litigation, and the employee asserted a work product claim.

The court, interpreting language identical to the federal standard, adopted the "because of" test set forth in *United States* v. *Adlman*, 134 F.3d 1194 (2d Cir. 1998), agreeing with the Second Circuit's reasoning that "[w]here a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision." *OneBeacon*, 2009 WL 415623, at *3. Applying *Adlman*, the court then held that the memoranda prepared by the employee's personal lawyer were protectable work product. *Id.* at *4.

Only in the context of then determining if the protection had been waived did the court consider the fact of disclosure to a third party, Ironshore. *Id.* at *4-*5. The court, relying on federal case law, considered whether the disclosure in this instance was inconsistent with maintaining secrecy against potential adversaries in litigation. *Id.* The court reasoned that even though the employee and prospective future employer were at arm's length regarding terms of possible employment, the employee and Ironshore "shared a common interest in assessing the potential

of, avoiding, and, if necessary, defending against, litigation" brought by OneBeacon. *Id.* at *5. Since Ironshore was not a potential adversary in those circumstances and the disclosure "did not substantially increase the opportunity for potential adversaries to obtain the information," the court held that the work product protection was not waived. *Id.*

Similar to Ironshore and its prospective employee, Textron and its auditor were not adversaries. The auditor has an interest in common with the potential litigant, while not in common with a potential adversary of the issuer. That an issuer has an independent legal obligation of disclosure to the auditor is of no consequence, as the district court below recognized when it correctly held that Textron had not waived work product protection.[9] *See* Pet. App.

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[9] At least fourteen district court opinions have held that disclosure of work product to financial auditors does not waive work product protection. *See Vacco* v. *Harrah's Operating Co.*, No. 1:07-CV-0663 (TJM/DEP), 2008 WL 4793719, at *6 (N.D.N.Y. Oct. 29, 2008); *SEC* v. *Roberts*, 254 F.R.D. 371, 381 (N.D. Cal. 2008); *Regions Financial Corp.* v. *United States*, No. 2:06-CV-895-RDP, 2008 WL 2139008, at *7-*8 (N.D. Ala. May 8, 2008), *appeal dismissed* No. 08-13866 (11th Cir. Dec. 30, 2008); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2006 WL 2850049, at *1 (N.D. Cal. Oct. 5, 2006); *Lawrence E. Jaffe Pension Plan* v. *Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006); *Int'l Design Concepts, Inc.* v. *Saks Inc.*, No. 05 CIV. 4754(PKC), 2006 WL 1564684, at *2 (S.D.N.Y. June 6, 2006); *American S.S. Owners Mut. Prot. & Indem. Assn.* v. *Alcoa S.S. Co.*, No. 04 Civ. 4309 LAKJCF, 2006 WL 278131, at *2 (S.D.N.Y. Feb. 2, 2006); *Frank Betz Assocs., Inc.* v. *Jim Walter Homes, Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005); *Merrill Lynch & Co.* v. *Allegheny Energy, Inc.*, 229 F.R.D. 441, 447 (S.D.N.Y. 2004); *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003); *Gutter* v. *E.I. DuPont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *3 (S.D.

112a-116a. That obligation arises from an auditor's engagement letter-agreement with the issuer, implementing the auditor's statutory obligation to obtain disclosure. Rule 26(b)(3) protects work product created by others under contractual arrangements that contain disclosure obligations similar to those imposed on issuers, such as insurers, indemnitors, and sureties.

Moreover, the fact that the auditor's own reserve calculations may be discoverable under this Court's decision in *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984), is no reason to ignore the text of the Rule as applied to an issuer's lawyer's work product disclosed in confidence to the auditor. Indeed, the availability of auditor-created information under *Arthur Young* should negate any need for an exception to the protection of the issuer's lawyer's work product under Rule 26(b)(3)(A)(ii).

Finally, because Textron has not waived work product protection, the answer to the question presented—i.e., whether the documents at issue are protected from disclosure as work product—should determine the outcome in this case. The petition therefore presents the Court with an ideal vehicle to

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Fla. May 18, 1998); *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993); *Gramm* v. *Horsehead Indus., Inc.*, No. 87 Civ. 5122, 1990 WL 142404, at *5 (S.D.N.Y. Jan. 25, 1990); *Tronitech, Inc.* v. *NCR Corp.*, 108 F.R.D. 655, 657 (S.D. Ind. 1985). Only two district court opinions have held that such disclosure constitutes waiver. *See Medinol, Ltd.* v. *Boston Scientific Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002); *In re Diasonics Sec. Litig.*, No. C-83-4584-RFP (FW), 1986 WL 53402, at *1 (N.D. Cal. Jun. 15, 1986).

correct the First Circuit's misapplication of Rule 26(b)(3).

CONCLUSION

For the foregoing reasons, and for those stated by petitioner Textron Inc. and Subsidiaries, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TEXTRON, INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

As explained below, the work product privilege is essential to the ability of product manufacturers to obtain full and candid legal counsel in anticipation of litigation. Not only are such assessments prepared directly for use in court, product manufacturers rely

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[1] In accordance with Rule 37.6, *amicus curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court.

upon analyses of potential litigation prepared by counsel in making a variety of business and regulatory compliance decisions. It is not uncommon for lawyers to develop such advice in consultation with engineers, technical experts, or suppliers, making the attorney-client privilege unavailable and work product privilege all the more critical.

The First Circuit's divided *en banc* opinion creates confusion within the circuit's own jurisprudence, in addition to division on the standard for application of the privilege among sister circuits. This case provides the Court with the opportunity to bringing needed clarity to the scope of the work product privilege based on sound public policy.

SUMMARY OF ARGUMENT

Clarity in the law of work-product privilege is essential to fulfilling its purpose. Without confidence that a document assessing litigation is protected, attorneys will be hesitant to provide full and candid legal advice to clients.

The First Circuit's ruling takes attorneys down this problematic path. The divided *en banc* decision holding that work papers developed by Textron's lawyers assessing the company's strengths and weaknesses in a likely tax dispute with the Internal Revenue Service (IRS) lack work-product protection has significant implications beyond tax law that warrant this Court's consideration.

In rejecting Textron's claim of work-product privilege, the First Circuit took an unduly narrow interpretation of its scope, finding that the privilege applies only to materials prepared "for use" at trial. *See United States v. Textron Inc. and Subsidiaries*,

Pet. App., 11a. In so doing, the First Circuit held that materials that include a candid assessment of actual or potential litigation by corporate counsel are subject to inspection by adverse parties if the materials were prepared to assist in complying with government regulations or for a business purpose rather than for direct use in an actual or anticipated trial.

Limitation of the work-product privilege in this manner would have serious adverse implications for product manufacturers. There are a wide range of situations in which manufacturers rely upon an assessment of anticipated litigation in making business or regulatory compliance decisions. For instance, a manufacturer may consider its potential liability, including the strengths and weaknesses of possible claims and defenses, in deciding whether to bring a new product to market, merge with another company, obtain additional insurance coverage, or, like Textron, evaluate the adequacy of its reserve fund. A manufacturer may also evaluate its potential liability when complying with regulatory obligations, such as determining whether to report a "substantial product hazard" to the Consumer Product Safety Commission. While such assessments may be motivated by a business or regulatory purpose and are not intended for use at trial, they are conducted *because of* anticipated litigation and reflect an attorney's mental impressions and strategy regarding how he or she would proceed in that litigation.

The public policy purpose of the work-product privilege would be severely curtailed if there is a considerable risk that an attorney's thought process about actual or potential litigation, composed during the course of his or her legal duties, will be subject to

inspection by an adverse party. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The law would create an incentive for manufacturers to make decisions about product safety, business issues, and regulatory matters, each of which may reflect consideration of anticipated litigation, based on incomplete written analyses, verbal assertions, and un-memorialized communications.

In light of these public policy considerations, several circuits apply a "because of" litigation test for work product privilege, which appropriately applies the privilege to documents that assess anticipated litigation in the context of making a business decision or complying with regulatory obligations. That line of demarcation is well-reasoned and understood.

The Fifth Circuit asks whether the document was prepared for the "primary purpose" of litigation or anticipated litigation, a narrower and more ambiguous test. The *Textron* decision takes an even more restrictive view—inquiring as to whether the attorney created the document "for use in" litigation. Pet. App., 11a.

In practical terms, the *Textron* majority places work-product privilege on par with Justice Potter Stewart's famous "I know it when I see it" observation with respect to obscenity, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), when it asserts, "Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (i.e., 'in anticipation of') law suit." Pet. App., 17a. Of course, the district court and First Circuit panel are composed of lawyers. Nevertheless, after a

split First Circuit panel affirmed the district court's finding of work-product privilege, a bare majority in the *en banc* court's decision rejected it. Clearly "every lawyer" who tries cases could only speculate as to whether the privilege applies. In sum, application of the privilege might come out differently under tests used in other circuits and possibly in the First Circuit itself as lower court judges try to divine the applicable test from First Circuit law. Thus, "a great divergence of views" has emerged in an area that is "so essential to an orderly working of our system of legal procedure." *Hickman*, 329 U.S. at 499, 512.

The First Circuit's ruling has sent a confusing message to the legal community and created unsound public policy incentives. In that regard, as the Court considers whether to grant certiorari, law firms are already counseling their clients to engage in the very type of inefficiency and "sharp practices" that this Court predicted would occur in the absence of protection of an attorney's mental impressions from unnecessary intrusion. *Id.* at 511.

This case provides the Court with an opportunity to clarify that the work-product privilege places function over form. The Court can provide the clarity that attorneys rely upon in their everyday work by firmly establishing that an attorney's assessment of actual or anticipated litigation is protected regardless of the "primary motivation" underlying the document at issue or whether it is developed for "use in" litigation.

For the foregoing reasons, the Court should grant certiorari.

ARGUMENT

I. THE PURPOSE AND POLICY UNDERLYING THE WORK PRODUCT PRIVILEGE AND ITS APPLICATION IN THIS CASE

The work-product privilege recognizes that, in order to provide the highest quality and most useful advice to a client regarding current or future litigation, a lawyer may need to consult with professionals in various fields, such as engineers, investigators, accountants, and technical experts. *See id.* As the *Hickman* Court recognized, "Proper presentation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." 329 U.S. at 511. Information gathered by the attorney, including analyses prepared by counsel for his or her own use, generally qualify for work-product protection. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

Unlike the attorney-client privilege, the work-product privilege places function over form. *See id.* at 238 ("[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system."). The work-product privilege protects such analyses so long as the material was generated "with an eye toward litigation," *Hickman*, 329 U.S. at 511, and it was not disclosed to third parties in a manner that would substantially increase the opportunity for potential adversaries to obtain the information. *See* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994 & Supp. 2009).

The Court crafted this privilege, codified in Federal Rule of Civil Procedure 26(b), to carefully protect the ability of an attorney to prepare for litigation without the risk that his or her theories could fall into the hands of opposing counsel. The work-product privilege is proprietary in nature, recognizing an attorney's interest in privacy in his or her work. *See Hickman*, 329 U.S. at 497. It applies to documents that the attorney prepares for his or her own use even if not shared with a client. This is demonstrated by the fact that, unlike the attorney-client privilege, both the attorney and the client can invoke the privilege. Without the work-product privilege, attorneys would be abundantly cautious in documenting their theories and strategies related to litigation, providing a disservice to clients who seek the most thoughtful, accurate, and detailed legal advice.

While the work-product privilege is broader than the attorney-client privilege, its protection is more qualified. Unlike the attorney-client privilege, the work-product privilege can be overcome through a showing of substantial need in certain circumstances to permit discovery of essential facts in an attorney's file that are not otherwise available. *See id.* at 512; Fed. R. Civ. Proc. 26(b)(3) (permitting an adverse party to obtain work-product material only upon a showing of "substantial need," *i.e.* when the information cannot be obtained from other sources without undue hardship). "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify produc-

tion through a subpoena or court order." *Hickman*, 329 U.S. at 512.

In the case before this Court, the First Circuit acknowledged that the IRS is seeking the "blueprint" prepared by Textron's lawyers of the positions the company took on its tax returns that they viewed as likely be challenged by the IRS, how Textron would defend its positions, and the likelihood, expressed as a percentage, that the IRS would prevail if the matter was litigated in court. Textron's lawyers prepared these documents, known as tax accrual workpapers to analyze the company's potential tax liability in connection with estimating its necessary reserves in a Securities and Exchange Commission filing. *See* Pet. App., 2a-7a. An assessment of anticipated litigation and the firm's potential liability exposure was integral to this task.

The First Circuit did not take issue with the IRS's explicit motivation for seeking the subpoenaed workpapers – having Textron's blueprint would save the time and expense of the IRS undertaking its own legal analysis of the 4,000-page tax return. *See id.* at 20a. From the perspective of the IRS, its job is made easier if it can use Textron's own assessment of "weak spots" in its return and Textron's own assessment of the likelihood that the IRS would prevail in litigation, rather than undertake its own assessment. Certainly, such knowledge would also facilitate a favorable settlement for the IRS.

The IRS does not contend that the information it seeks is otherwise unavailable or that obtaining it would constitute an undue burden. That is likely because the IRS already possesses all of the information on the factual circumstances underlying Tex-

tron's transactions in the company's filed tax return or responses provided to the IRS upon its request. Rather, the IRS candidly acknowledges that it seeks a shortcut in pursuing Textron for additional taxes based on Textron's lawyer's own assessment of gray areas in tax law. As this Court recognized in *Hickman*, however, "the work product of the lawyer" should not be open to the "free scrutiny of their adversaries." 329 U.S. at 511.

Work product comes in a variety of forms and contexts—"interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* Assessments of anticipated litigation and liability exposure included in tax accrual workpapers is but one variant that should qualify for work-product protection. This case provides the Court with an opportunity to restore a reasonable degree of predictability and certainty to an area that is essential to an attorney's everyday work. The Court can do so by firmly establishing that an attorney's assessment of actual or anticipated litigation is protected regardless of subjective and inconsequential determinations as to the "primary motivation" underlying the document at issue or whether it is developed for "use in" litigation.

II. MANUFACTURERS RELY UPON ASSESSMENTS OF ANTICIPATED LITIGATION IN A WIDE RANGE OF BUSINESS AND REGULATORY DECISIONS

Limitation of the work-product privilege to preclude its application to materials that include an attorney's evaluation of the strengths and weaknesses

of potential claims and defenses, and strategic thinking regarding current or anticipated litigation when they are not prepared for use at trial would have severe adverse implications for product manufacturers.

There are a wide range of situations in which manufacturers rely upon an assessment of anticipated litigation in making business or regulatory compliance decisions. The Second Circuit explored several hypothetical cases in *United States v. Adlman*, 134 F.3d 1194, 1199-1200 (2d Cir. 1998):

- A company contemplating a transaction recognizes that the transaction will lead to litigation. In deciding whether to proceed with the transaction, the company has its attorneys evaluate the likelihood of success in the litigation and, if it loses, its potential liability exposure. For instance, a manufacturer may decide whether to produce a product that arguably infringes on a competitor's patent based on its assessment of its potential liability exposure.

- A firm that is considering a merger with another company might ask its attorney to conduct a candid assessment of that company's likelihood of success in current litigation and its future liability exposure. For example, a manufacturer might closely investigate whether a company with which it is considering a merger produced, sold, or had asbestos-containing products on its property, and, if so,

> the number of potential claims, possible defenses, and settlement value.[2]

- A bank that is considering lending funds to a firm may request a report from the company's attorneys concerning its likelihood of success in litigation.

- A securities underwriter contemplating a public offering of the company's securities may wish to see such a study to decide whether to go ahead with the offering without waiting for the termination of the litigation.

In each of these scenarios, as well as the very situation before this Court, the assessment is not intended for use at trial and is motivated by a business purpose. Nevertheless, the document reveals the attorney's "most intimate strategies and assessments concerning the litigation." *Id.* at 1200. In such instances, the Second Circuit properly recognized:

> the company involved would require legal analysis that falls squarely within *Hickman's* area of primary concern—analysis that candidly discusses the attorney's litigation strategies, and perhaps the feasibility of a reasonable settlement. . . . If the company declines to make such analysis or scrimps on candor and

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[2] Such an evaluation can be extraordinarily important. For instance, businesses that did not produce asbestos products, but purchased a company that earlier produced asbestos-containing products are subject to substantial successor liability. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20-3 Mealey's Litig. Rep.: Asbestos 19 (2006).

> completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Id.

There are many other potential situations where allowing the *Textron* decision to stand would place product manufacturers at a substantial risk of losing the work-product privilege. Consider, for example, the questionable applicability of the privilege under the First Circuit's decision to a manufacturer whose attorneys evaluate its potential liability, including the strengths and weaknesses of possible claims and defenses in litigation, when deciding whether to bring a new product to market or alter a proposed design, or how to price the product to incorporate potential liability.

Questions about the applicability of the privilege will also arise as manufacturers strive to comply with regulatory obligations. For instance, under the First Circuit's rule, it is uncertain whether the privilege would apply when a company attorney, after learning of an injury involving its product, investigates whether there is a defect that constitutes a "substantial product hazard" or an "unreasonable risk of serious injury or death," triggering an obligation to file report with the Consumer Product Safety Commission (CPSC). *See* 15 U.S.C. § 2064(b). Such an analysis, while triggered by regulatory obliga-

tions, might explore matters such as whether there is a reasonable alternative design, the adequacy of instructions and warnings, and potential misuse of the product by consumers—issues at the core of potential state product liability litigation.

In addition, product manufacturers may instruct their attorneys to consider anticipated litigation and estimate liability exposure when making decisions involving the purchase of insurance, opening a new plant given variations in state law, or estimating necessary reserve funds.

While such assessments may be motivated by a business or regulatory purpose and are not intended for use at trial, they are conducted *because of* anticipated litigation and reflect an attorney's mental impressions and strategy. *Id.* ("The fact that a document's purpose is business-related appears irrelevant to the question of whether it should be protected under Rule 26(b)(3).").

The public policy purpose of the work-product privilege would be severely curtailed if there is a considerable risk an attorney's thought process about actual or potential litigation, composed during the course of his or her legal duties, will be subject to inspection by an adverse party. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Hickman*, 329 U.S. at 511; *see also In re Sealed Case*, 146 F.3d 881, 884 (9th Cir. 1998) ("Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes."). The law would create an incentive for manufacturers to make decisions about product

safety, business issues, and regulatory matters, each of which may reflect consideration of anticipated litigation, based on incomplete written analyses, verbal assertions, and un-memorialized communications.

III. CLARITY IN THE LAW OF PRIVILEGE IS ESSENTIAL

Clarity in the law of privilege is essential to fulfilling its purpose. Without confidence that a document assessing litigation is protected, attorneys will be hesitant to provide full and candid legal advice to clients. The First Circuit's decision takes attorneys further down the road of uncertainty.

A. Divergent Tests Among the Circuits and Within the First Circuit

As attorneys go about their daily work, they cannot, with a reasonable degree of certainty, know whether the advice provided to a client with respect to anticipated litigation is protected from disclosure under the work-product privilege, particularly when it is not directly applicable to a specific case or is rendered to provide guidance in a business or regulatory decision.

Courts applying the majority rule for work-product protection appropriately consider whether the assessment at issue was generated "because of" actual or anticipated litigation. *See, e.g., Adlman*, 134 F.3d at 1202; *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.3d 980, 984 (4th Cir. 1992); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir.

2006); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004); *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Committee v. United States Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987).

These courts generally adopted the approach expressed in Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994 & Supp. 2009), which finds that that a document should be considered "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of the litigation") (emphasis added).

The 2009 supplement to Federal Practice & Procedure takes the position that "'[d]ual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose." *Id.*, Supp. 2009 at 198. Indeed, courts adopting the "because of" test recognize that when a lawyer's work is motivated by a need to inform a business decision or comply with government regulations and also because of the prospect of litigation, it is subject to work-product protection. *See, e.g., Adlman*, 134 F.3d at 1202 (finding work-product privilege protected memorandum prepared by an accountant and lawyer to evaluate the tax implications of a proposed merger); *In re Special September 1978 Grand Jury Subpoena*, 640 F.2d

49, 61-62 (7th Cir. 1980) (finding work-product privilege protected materials that were produced for the filing of Board of Elections reports required under state law); *In re Grand Jury Subpoena*, 357 F.3d at 908-09 (finding work-product privilege protected advice rendered to cooperate with U.S. Environmental Protection Agency).

The Fifth Circuit, however, takes a different approach. In a case with facts similar to that before this Court, the Fifth Circuit has inquired as to whether the "primary motivating force" underlying preparation of the document was to ready a party for litigation, a subjective, narrower test. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982); *see also Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (continuing to apply the "primary motivating force" standard). Application of the work-product privilege to "dual-purpose" documents remains undecided in several other circuits.

The *Textron* decision adopts an even more stringent test than the minority approach, inquiring as to whether the attorney created the document for "use in" litigation. Pet. App., 11a.

While the *Textron* majority suggests that "Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (i.e., 'in anticipation of') law suit," *id.* at 17a, the progress of the very case before the Court demonstrate the confusion in the law. Of course, the district court and First Circuit panel are composed of lawyers. Nevertheless, after a split First Circuit panel affirmed the district court's finding of work-product privilege, Pet. App., 89a, a bare majority in the *en banc* court's decision rejected it, *id.* at 21a. The dissenting judges

would have sustained the privilege. *See id.* at 21a-46a (Torruella, J., joined by Lipez, J., dissenting). Clearly "every lawyer" who tries cases could only speculate as to whether the privilege applies. In sum, application of the privilege might come out differently under tests used in other circuits and possibly in the First Circuit itself as lower court judges try to divine the applicable test from First Circuit law.

Thus, "a great divergence of views" has emerged in an area that is "so essential to an orderly working of our system of legal procedure." *Hickman*, 329 U.S. at 499, 512.

B. Inefficiency and "Sharp Practices"

The First Circuit's ruling has sent a confusing message to the legal community and created unsound public policy incentives that are not in the public interest. In that regard, as the Court considers whether to grant certiorari, law firms are already counseling their clients to engage in the very type of inefficiency and "sharp practices" that this Court predicted would occur in absence of protection of an attorney's mental impressions from unnecessary intrusion. *Id.* at 511.

For instance, following the *en banc* opinion, law firms alerted their clients that "litigation opponents may be able to discover a company's analysis of the hazards posed by the claim if the analysis is prepared in connection with auditor review or other business uses aside from trial team preparation."[3]

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[3] Mayer Brown, *US First Circuit Changes Course in Textron; Holds Tax Accrual Workpapers Are Not Protected After All*,

In-house corporate counsel are warned that "preparation of documents required for a business purpose may trump a claim of work product protection where the documents were also relevant to anticipated litigation."[4] Given the common practice of undertaking litigation assessments in internal documents, one firm cautioned that "prudent litigators should take care in these very uncertain times.'"[5]

For these reasons, law firms are urging their corporate clients to "proceed cautiously in revealing attorney work product in documents that serve a business or regulatory function. Taxpayers should limit such disclosures to the extent possible."[6] As this Court foresaw in *Hickman*, law firms have counseled their clients about the need to "implement[ ] . . . practices and procedures to minimize the risk of being forced to disclose legal opinions and other sensitive information that have historically fallen within the zone of privacy protected by the work product

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Tax Controversy Update, Aug. 19, 2009, *at* http://www.mayerbrown.com/publications/article.asp?id=7417&nid=6.

[4] Stuart F. Pierson, *Circuit Holds that Tax Accrual Work Papers Are Not Protected Work Product*, Aug. 28, 2009, *at* http://www.troutmansanders.com/taxaccrual/.

[5] Kaye Scholer LLP, *Blurred Vision: Courts, Corporations Don't See Eye to Eye on Attorney Work Product Protection*, Oct. 19, 2009, *at* http://www.kayescholer.com/news/client_alerts/20091019/_res/id=sa_File1/LCA10192009.pdf.

[6] Shearman & Sterling LLP, *Client Publication: First Circuit Denies Work Product Protection to Litigation Risk Assessments Provided to Financial Auditors*, Aug. 21, 2009, *at* http://tiny.cc/zPaM2.

privilege" when analyzing litigation risks.[7] Similarly, another firm suggested "contemplat[ing] potential approaches . . . to maximize the possibility that their tax accrual workpapers and other potentially privileged documents remain protected by the work product doctrine under the new test created by *Textron*."[8] "Sharp practices," necessitated to prevent providing an adversary with the gift of a roadmap to an attorney's litigation strategy, have arrived.

Given the current state of the law, one can only imagine the types of creative devices that lawyers might employ to increase the probability that a court will maintain protection of sensitive assessments of litigation that also relate to a business or regulatory purpose. For instance, out of an abundance of caution, attorneys may begin legal memoranda by stating, "This analysis is undertaken for use in anticipated litigation. . . ." and then repeatedly refer to "litigation" throughout in order to gain confidence that a court will view the document as prepared for use in litigation or primarily motivated by litigation. They may prominently label documents "for potential use at trial." Attorneys may also draft separate memoranda, rather than a single document—a detailed assessment of the anticipated litigation at issue and a separate document providing no more than

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[7] Michelle M. Henkel, *Textron: Its Impact On the Viability of the Work Product Privilege*, 50 Tax Management Memorandum 515 (BNA, Dec. 7, 2009), *at* http://tiny.cc/srj9q.

[8] Sullivan & Cromwell LLP, *Work Product Doctrine: Federal Appeals Court Holds Tax Accrual Workpapers Are Not Protected by Work Product Doctrine and May Be Subject to Discovery*, Aug. 14, 2009, *at* http://tiny.cc/vJNXm.

a bare conclusion to inform business decision or comply with a regulatory obligation.

The public policy purpose of *Hickman* and Rule 26(b)—to protect an attorney's mental impressions of anticipated litigation from disclosure to an adversary—should not create an incentive for such maneuvers. It is against the public interest. In granting certiorari, this Court has an opportunity to make clear that an attorney's assessment of anticipated litigation is subject to work-product protection and that the privilege applies regardless of a document's form, consideration of the litigation in the context of business or regulatory objectives, or potential use in litigation.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Product Liability Advisory Council respectfully requests that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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Dated: January 27, 2010

APPENDIX

APPENDIX A

Corporate Members of the Product Liability Advisory Council
(as of January 13, 2010)

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Eli Lilly and Company
Emerson Electric Co.

Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Rubbermaid Inc.

Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Senco Products, Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

Supreme Court, U.S.
FILED
JAN 27 2010
OFFICE OF THE CLERK

No. 09-750

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF REED SMITH LLP, GRAYBAR ELECTRIC COMPANY, INC., AND U.S. STEEL CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE

Reed Smith LLP is a limited liability partnership. Reed Smith has no parent corporation and it does not issue stock.

Graybar Electric Company, Inc. is an employee-owned company that does not issue publicly-held stock. It has no parent corporation.

U.S. Steel Corporation has no parent corporation. No publicly-traded company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Reed Smith LLP is one of the fifteen largest law firms in the world, with nearly 1,500 lawyers in twenty-three cities. Reed Smith represents clients in a wide range of corporate and litigation matters.

Graybar Electric Company, Inc., an employee-owned company based in St. Louis, Missouri, is a leading North American distributor of electrical, telecommunications, and networking products.

U.S. Steel Corporation, headquartered in Pittsburgh, Pennsylvania, is an integrated steel producer with major production operations in the United States, Canada and Central Europe with an annual raw steelmaking capability of 31.7 million net tons. U.S. Steel manufactures a wide range of value-added steel sheet and tubular products for the

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[1] As required by Supreme Court Rule 37.2(a), the undersigned counsel for amici certifies that counsel of record for all parties received timely notice of the amici's intention to file a brief in support of the Petitioner at least ten days prior to the due date for the amici curiae brief. Letters reflecting the parties' consent to the filing of this brief are being lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for the amici states that no counsel for a party authored this brief in whole or in part. No person other than amicus Reed Smith LLP made a monetary contribution to the preparation or submission of this brief.

automotive, appliance, container, industrial machinery, construction, and oil and gas industries.

Graybar and U.S. Steel support the longstanding public policy favoring broad access to the advice and opinions of legal counsel, and are concerned that the First Circuit's *en banc* decision in *Textron*, if not reversed by this Court, will seriously undermine this fundamental privilege.

Amici have read the relevant pleadings related to the Petition for Certiorari, as well as the briefs and opinions in the courts below. They also have reviewed the list of amici in this Court. Amici believe that the perspective they offer the Court is particularly relevant, coming as it does from companies that frequently engage counsel to provide written legal advice on matters where litigation is anticipated, but not yet filed. For its part, Reed Smith regularly advises companies in these circumstances and shares its clients' concerns about the First Circuit's troubling application of the work product privilege.

The descriptions in this brief of situations in which written legal opinions are given by in-house or retained counsel, and the difficulties associated with seeking and providing those opinions when (as now) they are not uniformly protected, come from amici's own experience. This brief is submitted to highlight the concreteness and immediacy of the legal issues the Petition raises.

ARGUMENT

The opinion below deepened the already significant split among the Circuits regarding the scope of the work product privilege. This split threatens the traditional protections afforded by this privilege and creates uncertainty for all companies that rely upon their counsel for candid written opinions regarding the risks of potential litigation. The implications of this case extend beyond the discoverability of tax accrual workpapers, as critically important as that narrow issue is for corporate America. The First Circuit's *en banc* decision potentially vitiates work product protection in a wide range of common litigator-to-client communications and threatens to impair companies' abilities to obtain frank evaluations of all types of litigation risks from both in-house and retained counsel.

The First Circuit's holding, if allowed to stand, will severely and adversely affect the way companies seek and lawyers provide advice, and will change fundamentally certain important dynamics in civil litigation. The First Circuit's approach materially raises the stakes when a court issues an adverse privilege ruling because such rulings are now not immediately appealable under the collateral order doctrine. Perhaps most importantly, the First Circuit's significant narrowing of the work product privilege can be a game-changer in civil litigation. A lawyer's most sensitive work product–often a

roadmap for litigation victory or negotiation dominance when placed into an adversary's hands–is now likely to be unprotected from the client's adversaries whenever it is divulged to a company's auditors or other friendly parties.

Corporate America and the lawyers who serve it need a pronouncement from this Court of a single, workable statement of the scope of the work product privilege, particularly as it pertains to the application of the privilege when litigation is anticipated but not yet pending. More specifically, we need this Court to restore the historic protections afforded to the mental impressions of the attorneys whose candid advice corporations should be able to obtain without fear of disclosure to an adversary.

A. The Court should hear the case because the Circuit split causes intolerable uncertainty for all companies that count on their lawyers to provide them with candid written evaluations of litigation risks well in advance of litigation.

Amici are two Fortune 500 companies and a worldwide law firm that represents clients in all types of litigation and counsels them on litigation risks. In situations where they anticipate that litigation will ensue, amici and their lawyers, including firms like Reed Smith, routinely exchange thoughts, impressions, and opinions on the viability of legal positions and the range of possible outcomes.

Corporations, like amici, regularly have these communications with their in-house counsel as well.

The First Circuit's construction and application of Federal Rule of Civil Procedure 26(b)(3) has effectively redrafted the Rule by reading "anticipation of litigation" to mean "anticipation of using at trial" when it comes to documents setting forth a lawyer's mental impressions and legal analyses. That unwarranted editing–which violates settled principles of statutory construction–robs Rule 26(b)(3) of much of its protective force. For clients and the lawyers who advise them, the result is a legal minefield, bordered by uncertainty, where their most confidential legal advice must be disclosed freely to adversaries–here, a taxing agency.

The novel rule announced below has widespread implications, especially since there often is considerable uncertainty as to which law will apply or what considerations will influence the privilege law controlling in federal civil litigation. *Cf.* J. Corr, *Attorney-Client Privilege in the United States* § 12.4 (2d ed. 2009) (describing how the "choice of law analysis tends to become particularly uncertain" when evaluating which law of privilege applies); *see also id.* § 12.22.

Plainly, this is no area for mixed messages or palpable inconsistency. Lawyers and clients alike need to know *ex ante*–and well before litigation actually is filed or a trial commences–that

documents conveying lawyers' mental impressions and legal opinions prepared in anticipation of litigation will be protected by the work product doctrine. The First Circuit's holding and rationale fail that essential purpose and thereby undermine the certainty Rule 26(b)(3) is intended to promote. This Court's intervention accordingly is needed to resolve this Circuit conflict and put the work product privilege back on its proper footing.

1. The *Textron* rule vitiates the attorney work product privilege in a wide variety of business transactions in which it may be the only privilege that will keep an attorney's mental impressions out of adversaries' hands.

Although the First Circuit purported to be solicitous of the mental impressions of trial lawyers, the court's holding actually vitiates the work product privilege for a wide range of common litigator–to–client communications, and impairs companies' willingness and ability to obtain effective, candid evaluations of their litigation risks in a wide range of circumstances. The attorney-client privilege is one of the principal means for protecting from disclosure communications in which legal advice is shared. When it comes to the legal opinions or positions themselves, however, the confidentiality afforded by the attorney–client privilege is buttressed by the

additional protections afforded by the work product doctrine.

Indeed, the work product privilege often is the only available protection against the compelled disclosure of lawyers' mental impressions and other written work product to the client's adversaries. This is because the standards for when a company waives the protection of the attorney-client privilege are more easily met than the standards governing waiver of the work product privilege (which is waived only if the client disclosed it in a way "inconsistent with keeping it from an adversary"). *E.g., United States v. Mass. Inst. Of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Clients thus may waive the attorney-client privilege in order to advance legitimate business interests (*e.g.*, by sharing the advice of in-house or retained counsel with third parties such as auditors, prospective merger partners, and the like).[2]

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[2] *See In re Juniper Networks, Inc. Securities Litig.*, Nos. 06-4327 & 08-00246, 2009 WL 4644534 (N.D. Cal. Dec. 9, 2009) (audit committee's disclosure of contents of interview to outside auditors waived attorney-client privilege); *Nidec Corp. v. Victor Co. Of Japan*, 249 F.R.D. 575 (N.D. Cal. 2007) (corporation's disclosure of "litigation abstract" evaluating possible litigation to a potential bidder for its shares waived attorney-client privilege over that abstract); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342 (N.D. Ohio 1999) (disclosure of legal advice to potential business partner regarding a transaction waived attorney-client privilege); *SCM Corp. v. Xerox Corp.*, 70 F.R.D.

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Historically, however, they could take comfort in the knowledge that the work product privilege nevertheless protected their lawyers' most sensitive opinions from compelled disclosure to their adversaries.[3]

The First Circuit's opinion has profoundly changed that legal landscape. Its holding may well foreclose the application of the work product doctrine in many situations where it serves its paramount purpose. The unavailability of the work product privilege will, in turn, compromise the attorney-client relationship and limit clients' access to candid written opinions from their lawyers.

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508 (D. Conn. 1976) (discussions between joint venturers relating to one party's effort to relinquish control of the venture to the other waived attorney-client privilege).

[3] *See SEC v. Roberts*, 254 F.R.D. 371 (N.D. Cal. 2008) (work product privilege protected lawyers' mental impressions of interview of former employees from compelled disclosure to adversaries, despite disclosure to the company's outside auditor); *Int'l Design Concepts, Inc. v. Saks Inc.*, No. 05-4754, 2006 WL 1564684 (S.D.N.Y. June 6, 2006) (work product privilege protected lawyers' memoranda summarizing interviews regarding potential litigation, despite disclosure to outside auditor); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004) (work product privilege protected a law firm's reports following an internal investigation of theft by client's employee, despite client's disclosure of reports to its outside auditor).

There are many situations in which clients need legal advice regarding potential litigation exposures, and need to share that advice with aligned parties, but in which the lawyer does *not* intend to use his or her risk assessment at a future trial. For example:

- Companies that make public filings with the Securities and Exchange Commission must divulge their lawyers' litigation risk assessments to their accounting firm in connection with the accountant's attestation as to the adequacy of financial statement reserves for uncertain tax and other legal exposures. Indeed, in the wake of corporate accounting scandals, auditors are asking their corporate clients for a broader range of documents, including privileged documents, than ever before in this country's history.[4]

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[4] For example, in 2003, the American Institute of Certified Public Accountants ("AICPA") amended its interpretation of auditing standard AU § 9326 (addressing an auditor's duty to obtain evidence on income tax accruals) to provide that "the auditor should obtain access to the opinion, notwithstanding potential concerns regarding attorney-client or other forms of privilege." AU § 9326, *Evidential Matter: Auditing Interpretations of Section 326*, ¶ 2.22 (AICPA 2003), available at http://www.pcaobus.org/standards/interim_standards/auditing_

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- Corporations' in-house and outside lawyers often respond to auditors' inquiries about threatened litigation and its potential impact on the corporation's financial statements.

- Publicly traded companies and other public filing companies must establish reserves on their financial statements for uncertain tax positions, and frequently must obtain the advice of counsel in that regard. They need to disclose that legal advice to their public accounting firm in the attestation process regarding the percentage likelihood that the company will prevail in litigation regarding that exposure if challenged by federal or state taxing authorities.

- In-house or retained counsel may advise on the risk of potential future litigation when a company is designing, developing, and introducing a new product into the marketplace. The client may need to share those

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standards/au_9326.html). If the corporation balks at permitting the auditor to examine the documents, he or she "should assess the importance of the client-imposed scope limitation on his or her ability to form an opinion." *Id.*, ¶ 2.09.

assessments with consultants, public relations firms, or other closely aligned parties.

- A company may be obliged to share, or may have business reasons to share, its counsel's evaluation of litigation risks with a potential merger candidate, financier, or investor.

- Companies seek and receive legal advice regarding potential liabilities upon receiving a request for information from a government agency that may or may not lead to litigation with the agency. The company may have *bona fide* business reasons to share that legal advice with its auditors and consultants.

- In-house and retained counsel also often make written assessments of their clients' legal risks in a wide variety of circumstances with an eye toward *avoiding* litigation through settlement.

Indeed, as the dissent below pointed out, "[n]early every major business decision by a public company has a legal dimension that will require [litigation] analysis. Corporate attorneys preparing such analyses should now be aware that their work

product is not protected in this circuit." Pet. App., 34a.

The work product privilege, however, plays just as important a role in any of these fact patterns as it does for advice provided on the eve of trial. Access to lawyers' candid and contemplative legal advice in these circumstances facilitates strategic decision making directly related to potential litigation. The work product privilege is intended to afford clients the opportunity to obtain that advice without fear that it will be disclosed to an adversary. The ability of in-house or outside counsel to properly advise a client with an eye on litigation risks or strategies is materially compromised if the client thinks it likely that counsel's opinions ultimately will end up in the hands of opposing counsel in litigation.

2. The *Textron* rule will fundamentally alter the dynamics in civil litigation and will profoundly change the way companies seek, and lawyers provide, legal advice.

The First Circuit's approach also raises the stakes of an adverse, but erroneous, privilege ruling in all civil litigation. This Court recently held that an adverse ruling on a claim of attorney-client privilege is not immediately appealable under the collateral order doctrine. *Mohawk Indus., Inc. v.*

Carpenter, 130 S. Ct. 599, 603 (2009). The Court's reasoning makes it likely that litigants will not readily be able to take interlocutory appeals from adverse work product privilege rulings either.

However, a non-appealable ruling that an attorney's most sensitive mental impressions are freely discoverable by the adverse party will put hydraulic pressure on the client to settle rather than produce the documents and continue to litigate. Even legally and factually flimsy claims may produce windfalls if the plaintiff is able to force his opponent to produce its lawyers' written roadmap to the strengths and weaknesses of its case.

This combination of forces–a ruling (or even the threat of a ruling) that a lawyer's most sensitive opinion work product must be disclosed to the adverse party, coupled with the lack of immediate appellate review–fundamentally and unfairly changes the dynamics and the balance of power in all civil litigation.

In the wake of *Textron*, companies and their lawyers will have to change the way they seek and provide legal advice, to the detriment of the companies, their shareholders, and the robust attorney-client relationship that *Hickman v. Taylor*, 329 U.S. 495 (1947), recognized as being so important. As this Court rightly perceived in *Hickman*, if written materials that were prepared

"with an eye toward litigation" were "open to opposing counsel on mere demand":

> much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511.

Indeed, the end result of the First Circuit's truncation of the language of Rule 26(b)(3) is the very result this Court sought to prevent in *Hickman*: an opposing party getting a free ride off his adversary's legal analysis and opinions. The palpable threat that counsel's research and thinking will be discoverable in future litigation will lead to a race to the bottom as regards the quality and depth of lawyers' written analyses of their clients' litigation risks.

Because Congress codified *Hickman* in Fed. R. Civ. P. 26(b)(3), it, and not the courts, should decide whether such a paradigm shift is warranted. *Cf. Mohawk Industries*, 130 S. Ct. at 609; *id.* at 609-10 (Thomas, J., concurring).

B. The Court should hear the case in order to restore needed uniformity and certainty for companies that count on the right to obtain privileged written assessments of litigation risks from their lawyers.

The Court should hear the case in order to provide much-needed uniformity and restore certainty in the Circuits' approaches to the application of the work product doctrine. There is no principled reason why a company headquartered in (or sued in) Rhode Island should receive fundamentally different treatment in discovery than a company headquartered in (or sued in) New York. To the contrary, by enacting Federal Rule of Evidence 501 in 1974, Congress sought to create a *uniform* federal common law of privilege in cases involving federal claims.[5] *See* Fed. R. Evid. 501

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[5] Fed. R. Evid. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision

Continued on following page

(Notes to 1974 Enactment). Especially in view of the First Circuit's extremely narrow reading of Rule 26(b)(3), however, federal law is far from uniform.

This wide range of approaches to the application of Rule 26(b)(3) is especially problematic given the prevalence of multi-district litigation under 28 U.S.C. § 1407. If a suit is filed in the Second Circuit, but transferred by the Judicial Panel on Multi-District Litigation to a district court in the First Circuit, does the *Textron* rule–the law of the transferee circuit–apply (even though none of the parties has any connection with that jurisdiction and despite the parties' reasonable expectations)? Intractable problems also arise if the transferee court applies the privilege rules of the transferor courts. Because the Circuits have markedly different approaches to the breadth of the work product privilege, applying the rules of the transferor courts will result in fundamentally different rulings in the consolidated cases, even though the cases presumably involve many of the same parties, claims, and issues. These and like problems highlight the need for a uniform rule and the mischief that is created where (as here) the rules vary widely.

Continued from previous page

thereof shall be determined in accordance with State law.

The conflict among the Circuits that the First Circuit has deepened also is likely to encourage strategic behavior in civil litigation over access to an opponent's legal roadmaps. This, in turn, is likely to increase collateral disputes, thereby increasing the cost and burden of litigation on the litigants and on the judicial system. In light of the well-documented differences among the Circuits regarding the discoverability of a lawyer's most sensitive mental impressions, one can expect to see more disputes over venue selection, choice of law, and choice of forum, as litigators seek the forum in which they are best able to take "a free ride on the research and thinking of [their] opponent's lawyer[.]" *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

Moreover, because federal privilege laws apply to pendent state law claims asserted in federal court, *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987); *Wm. T. Thompson Co. v. Gen. Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982); *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992), a federal rule (like the rule in *Textron*) that permits extraordinarily broad discovery of opposing counsel's most sensitive mental impressions will be a strategic factor leading lawyers to find a way to sue in federal court. This, too, is likely to generate a raft of collateral litigation, as the courts attempt to winnow out dubious federal claims that were asserted primarily in an effort to obtain the benefit of favorable federal privilege law.

The pronouncement of a single, workable standard will provide help to litigators and their clients, and achieve the nationwide uniformity Federal Rule of Evidence 501 contemplates. The "because of the prospect of litigation" test used in the Second and Sixth Circuits (*United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006)) is workable, consistent with *Hickman*, and faithful to the language of Rule 26(b)(3). Accordingly, we join the Petitioner in asking this Court to grant the petition and reverse the First Circuit's *en banc* decision.

CONCLUSION

For the reasons noted, amici respectfully maintain that the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE

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TEXTRON INC. AND SUBSIDIARIES,
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v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute, Inc. states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file an *amicus* brief under this rule and both parties have consented to its submission in letters filed with the Clerk.

"TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of business taxpayers. Among the standards of professional conduct that all TEI members subscribe to is the following:

> [The member] will present the facts required in tax returns and all the facts pertinent to the resolution of questions at issue with representatives of the government imposing the tax.[2]

TEI has approximately 7,000 members who represent more than 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI members have a vital interest in the resolution of the work-product privilege issue in this case. Substantially all TEI members are employed by corporations that are subject to federal securities and tax laws, compliance with which requires the preparation of tax accrual workpapers or similar documents; most work for companies that, because of their size and complexity, are under continuous audit by the Internal Revenue Service (IRS). Consequently, TEI members or their coworkers are almost without exception involved in the preparation or review of tax

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[2] *See* http://www.tei.org/Resource.phx/public/standards.htx.

accrual workpapers. As such, a decision by this Court whether to hear this case and resolve interpretative questions about the scope of the work product privilege will directly affect TEI members and the companies by whom they are employed. Accordingly, the Institute has a special interest in this matter.

ARGUMENT

I. BACKGROUND

In 2003, the IRS began an examination of the federal income tax returns of petitioner, Textron Inc., for the tax years 1998 to 2001. In connection with that examination, the IRS issued an administrative summons for petitioner's 2001 workpapers. Citing, among other things, the work-product privilege, Textron withheld certain documents, including a spreadsheet prepared by its lawyers listing items on its return that the IRS could potentially dispute and, as to each item, estimated the likelihood of success in the event of a dispute. The government filed a petition to enforce a summons for the documents in the U.S. District Court for the District of Rhode Island. The district court denied the petition. A panel of the U.S. Court of Appeals for the First Circuit initially affirmed. After granting rehearing *en banc*, the court of appeals reversed.

II. AN IRRECONCILABLE THREE-WAY SPLIT AMONG THE CIRCUIT COURTS MUDDLES THE APPLICATION OF THE WORK-PRODUCT PRIVILEGE, SPAWNING UNCERTAINTY AND UNDERMINING THE ATTORNEY-CLIENT RELATIONSHIP

This case concerns the scope of the work-product privilege codified in Rule 26(b)(3) of the Federal

Rules of Civil Procedure and, specifically, the meaning of the phrase "in anticipation of litigation" in applying the privilege. More fundamentally, it involves whether the IRS can properly gain access to the thoughts, mental impressions, opinions, and legal theories of a taxpayer's attorneys about the merits of positions taken on a tax return.

Pursuant to Rule 10, one of the considerations governing the review of petitions for writs of certiorari is whether the underlying case involves a conflict among the U.S. courts of appeals or whether it involves a decision of a U.S. court of appeals on an important question of federal law that has not been, but should be, settled by the Court. Such a conflict exists here in respect of the proper scope of the work-product privilege. While not every circuit conflict merits resolution by the Court, where the law is thrown into disarray—here, with the emergence of not two, but three, divergent and irreconcilable views—the matter becomes "ripe for the Supreme Court to intervene and set the circuits straight on [the] issue." (App. 45a (Torruella, J., with Lipez, J., dissenting).)[3] *Amicus* TEI respectfully submits that the Court should act to end the confusion surrounding the proper scope of Rule 26(b)(3) and thereby provide the certainty essential to vindicate the policy undergirding the work-product privilege.

The work-product privilege was first recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). There, in discovery, the plaintiff sought materials

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[3] The court below also recognized the conflict: "[T]here is some difference in the interpretations adopted in different circuits. . . ." Order Staying Mandate, *United States of America v. Textron Inc. and Subsidiaries*, September 16, 2009. (App. 120a.)

"secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." The Court held that the "work product" of the lawyer, "written materials obtained or prepared by an adversary's counsel with an eye toward litigation," was protected from disclosure. The Court explained that "proper preparation of a client's case demands that he assemble information . . . prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 512. As Justice Jackson wrote in his concurring opinion, "[d]iscovery is hardly intended to enable a learned profession to perform its functions either without wits or with wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).

In 1970, the Federal Rules of Civil Procedure were amended to codify the work-product privilege. Rule 26(b)(3) provides that the work-product privilege covers "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."

The work-product privilege is not absolute. Thus, where a party to litigation can show that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," the party can obtain production of otherwise protected materials. Fed. R. Civ. P. 26(b)(3)(A)(ii). Even such a showing, however, will not entitle a party to obtain "opinion work-product," *i.e.*, materials that would "disclos[e] . . . the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

Thus, the work-product privilege must be applied in a manner that permits the attorney's analytical and strategic work to be done in private. Otherwise, its efficacy will be diminished. As the Court explained in *Hickman*, the privilege in respect of documents prepared "in anticipation of litigation" (as the term is used in Rule 26(b)(3)) is necessary because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 511.

Regrettably, the absence of guidance from this Court since its decision six decades ago in *Hickman* has muddled the contours of the work-product privilege. Thus, three different standards have been crafted and applied by the courts of appeals in interpreting the phrase "in anticipation of litigation." Eight circuits have embraced a "because of" standard, protecting from disclosure documents prepared because of the prospect of litigation. *See, e.g.*, *In Re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004). A ninth court of appeals—the Fifth Circuit—employs a test that looks to whether the "primary motivating purpose" for which the document was prepared was to assist in litigation. *United States v. El Paso Co.*, 682 F.2d 530 (5th

Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). And finally, the First Circuit in this case conjured up its own idiosyncratic standard that would permit the disclosure of documents except where they were "prepared for use in possible litigation." (App. at 11a.)

These three standards are incompatible with one another, and the resulting confusion robs parties to disputes (or potential disputes) of the protection intended by the work-product privilege. The situation calls out for intervention by this Court. Otherwise, attorneys and their clients will be unable to know with certainty which documents are "prepared in anticipation of litigation" and thus protected from disclosure. The uncertainty will impede candor between attorneys and their clients, and the divergent standards could even prompt litigants to forum shop, seeking to file lawsuits in the jurisdiction whose interpretation of Rule 26(b)(3) benefits them. Because the work-product privilege is essential to the proper functioning of the adversarial legal system, the Court should grant the writ of certiorari and hold that the "because of" standard applies in interpreting the "in anticipation of litigation" requirement of Rule 26(b)(3).

III. TAX ACCRUAL WORKPAPERS, THE DOCUMENTS AT ISSUE, CONTAIN THE MENTAL IMPRESSIONS, THEORIES, AND ASSESSMENTS THAT THE WORK-PRODUCT PRIVILEGE IS INTENDED TO PROTECT

A. The IRS's Summons Power Is Subject to the Work-Product Privilege

Section 7602 of the Internal Revenue Code authorizes the IRS to issue administrative summonses for

the production of "any books, papers, records, or other data which may be relevant or material" in "ascertaining the correctness of any return . . . , determining the liability of any person for any internal revenue tax . . . , or collecting any such liability. . . ." 26 U.S.C. § 7602(a). This Court has described section 7602 as a "broad summons authority" reflecting a "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis added).

The obligations imposed by the tax summons, however, are not without limit. Rather, they are subject to the conditions of *United States v. Powell*, 370 U.S. 48 (1964),[4] and, as important, to "traditional privileges and limitations." *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981). Nothing in the language of the IRS summons provision or its legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine to materials summonsed by the IRS. *Id.*

B. Governmental Authorities Must Focus on Facts and not Thought Processes or Mental Impressions

Textron's dispute with the IRS centers on the correctness of its 2001 tax return, the evaluation of which requires the IRS to examine the facts and circumstances related to the transactions at issue

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[4] The Court granted certiorari in *Powell* "[b]ecause of the differing views in the circuits on the standards the Internal Revenue Service must meet to obtain judicial enforcement of its orders. . . ." 379 U.S. 50-51 (footnote omitted). As explained in the prior section, the same concern should prompt the Court's review in this case.

and to apply the pertinent tax law to those facts. Without question, those facts were readily available to the IRS by means of an examination of Textron's tax return and the agency's administrative fact-finding processes (including its ability to issue administrative summonses). Indeed, during the course of the examination, the IRS issued more than 500 formal requests for information, with Textron producing "many filing cabinets" worth of material in response to those requests. (App. 91a.)

Notwithstanding this voluminous production, the government sought more. It did not confine its requests to factual information relating to transactions; it sought access to Textron's tax accrual workpapers, which contain the company's theories, opinions, arguments, and speculations about its contingent tax liabilities, *i.e.*, the thought processes underlying the positions Textron reported on its tax return.

The opinions and conclusions of Textron's counsel and tax advisers, as embodied in the tax accrual workpapers, would provide the IRS with a "blueprint" (App. 20a) or "roadmap" into the company's own analysis of the strengths and weaknesses of its positions (including its negotiation and litigation strategy). As such, they are the very "mental impressions" that the Court in *Hickman* sought to protect from disclosure. 329 U.S. at 510. Further, those opinions do not directly bear on the determination of Textron's tax liability. The determination of any tax owed by Textron must be based on *factual* information—readily available from the tax return or through formal requests for information—not on opinions reflecting the thought processes of Textron's attorneys.

The First Circuit stated that "if a blueprint to Textron's possible improper deductions can be found in Textron's files, it is properly available to the government *unless* privileged." (App. 20a (emphasis in original).) That statement, however, is tautological because the question presented is whether the documents are, in fact, privileged. Noting that the petitioner in *Hickman* sought documents "to make sure he that he has overlooked nothing," 329 U.S. at 513, the Court held: "That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [opposing counsel's] professional activities." *Id.*[5]

C. Although Tax Accrual Workpapers Serve a "Dual Purpose," They Are Properly Subject to Work-Product Protection

It is beyond question that the documents at issue served two purposes: one, to assist Textron's auditors in determining the amount to be set aside in reserve for potential tax liabilities, and two, to guide Textron in making litigation or settlement decisions concerning the treatment of certain items. (App. 35a-36a.) Confoundingly, the First Circuit embraced the first (App. 12a), but ignored the second (App. 14a-15a). More important, the court disregarded the essential nature of the documents—*legal* analysis (*i.e.*, attorney work-product) of the issues relating to *both* purposes. In other words, it denied the complexity of

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[5] The court below dismissed Textron's concerns about giving the IRS a "blueprint" by stating that tax collection is not a game. (App. 20a.) That is indisputably true, but the integrity of the voluntary, self-assessment tax system is best preserved by enabling taxpayers to secure candid and complete legal advice.

the marketplace and interdependence of the applicable tax (legal) and financial regulatory regimes that necessitate the involvement of attorneys and access to the lawyer's "mental impressions, conclusions, or legal theories" in respect of the transactions reflected on the taxpayer's tax return.

Tax accrual workpapers represent a bridge between the tax and financial reporting worlds. Here, the documents at issue were prepared by Textron's attorneys because the company anticipated the possibility of litigation with the IRS regarding various items on its return. They reflected the opinions of Textron's attorneys about which items might be challenged by the IRS, their legal assessment of the hazards of litigating those issues, and their recommendation of the tax reserve amounts that should be accrued because of those hazards. The workpapers would not have been prepared "but for" the fact that Textron anticipated the possibility of litigation with the IRS.

Indeed, absent litigation, or the prospect of it, there would have been no reason for Textron to establish any reserve or to prepare the workpapers used to calculate the reserve. This is the case even though the workpapers assisted Textron in determining the amount to be reserved to cover any potential tax liabilities and were useful in obtaining an "unqualified" opinion from its auditors regarding the adequacy of reserves.

The presence of dual purpose documents in a case involving the work-product privilege does not present a new, unique, or insuperable analytical challenge. Such documents have been evaluated by courts since the Court's decision in *Hickman*. The applicability of the work-product privilege to dual purpose documents

in a tax case has been addressed in several cases, most notably *United States v. Adlman*, 134 F.3d 1294 (2d Cir. 1998), which the First Circuit has cited with approval. *See Maine v. United States Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002) ("In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted by *Adlman* and by five other courts of appeals.").

In *Adlman*, the Second Circuit considered whether the work-product privilege applied where a document in a tax case was created both in anticipating litigation and for a business purpose. In embracing the "because of" interpretation of Fed. R. Civ. P. 26(b)(3), the court rejected the "primary purpose" test extant in the Fifth Circuit, which only grants work-product immunity to workpapers prepared "primarily motivated to assist in future litigation over the return." *See United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982). The Second Circuit made clear, moreover, that the "because of" formulation is not limited to documents prepared *for use* in litigation:

> We believe that the requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the

> making of a business decision do not fall within this rule.

Adlman, 134 F.3d at 1198-99.

The Second Circuit's analysis of dual purpose documents for purposes of Rule 26(b)(3) is clearly correct. Textron's tax accrual workpapers by their very nature assessed matters implicated by the attorney-client privilege—the legal consequences associated with making certain business decisions (*e.g.*, entering into a transaction and reporting it on a tax return). They are unquestionably suffused with the mental impressions and opinions of Textron's attorneys and, hence, should be accorded the protection of the work-product privilege.

D. The First Circuit's Standard Would Subject to Discovery All Documents Assessing Ongoing or Potential Litigation Risks

Left standing, the First Circuit's exceptionally narrow interpretation of Rule 26(b)(3) would have far-reaching consequences beyond tax accrual workpapers and the establishment of financial reserves for tax contingencies. Specifically, its effect would extend to all litigation and allow parties in a broad range of litigation contexts—both public and private—to access documents reflecting lawyers' strategy or analysis of their clients' claims.

Stated differently, attorneys and clients engaged (or potentially engaged) in disputes involving, for example, environmental liability, products liability, or intellectual property, would be subject to the vagaries of the First Circuit's tortured construction of the work-product privilege. Every document prepared by counsel that assesses risks of ongoing or

potential litigation could well be subject to discovery because, under the First Circuit's standard, such documents could not be said to have been prepared "for use" in litigation. One could conclude under the interpretation of the First Circuit that no document prepared prior to the initiation of litigation would qualify for protection under the privilege, as prior to that initiation, there is no litigation in which to use the document.

In short, the standard propounded by the court below threatens to vitiate the work-product privilege, depriving clients of its protection in a broad range of cases with respect to a broad range of documents. It would allow the IRS, in the words employed by Justice Jackson in *Hickman*, "to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516 (Jackson, J., concurring).

IV. RECENT LEGISLATIVE AND FINANCIAL REPORTING REQUIREMENTS MANDATING GREATER DISCLOSURE PROVIDE AN INDEPENDENT BASIS FOR PROTECTING THE DOCUMENTS AT ISSUE FROM DISCLOSURE

Two and a half decades ago, the Court reviewed a decision of the Second Circuit holding that accountant-prepared tax accrual workpapers were protected from disclosure under an analog of the work-product privilege, but declined to uphold the appeals court's decision that public policy requires that an IRS summons for such documents ordinarily not be enforced. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), *reversing* 677 F.2d 211 (2d Cir.

1982).[6] Specifically, the Court framed the issue as whether a general accountant-client privilege should be created, rather than a work-product privilege linked (and limited) to the independent auditors' role in preserving the integrity of the financial markets by encouraging open communication between companies and their auditors. In 1984, the Court answered that question in the negative. Significant changes in federal securities laws and financial reporting since the Court's decision in *Arthur Young*, however, should prompt the Court to revisit that issue and to hold that tax accrual workpapers are

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[6] The appeals court in *Arthur Young* acknowledged that tax accrual workpapers may be potentially relevant within the meaning of section 7602 of the Internal Revenue Code (26 U.S.C. § 7602), but drew upon the Court's decision in *Hickman v. Taylor* to hold that public policy requires that a summons for such workpapers ordinarily not be enforced; accordingly, it fashioned a work-product privilege that, in the absence of fraud, would shield the documents from compelled disclosure. 677 F.2d at 220-21. Taking a different approach, the Tenth Circuit in *United States v. Coopers & Lybrand*, 550 F.2d 617 (10th Cir. 1977), held that a summons for such documents was not enforceable under section 7604 because those documents are not relevant to the taxpayer's tax liability. *Id.* at 619 (several factors must be weighed in deciding whether tax accrual workpapers are relevant, including the adverse effect might have on the interchange between taxpayers and its independent auditors and any resulting weakening of the securities law). *Accord United States v. Matras*, 487 F.2d 1271, 1275 (8th Cir. 1973) ("If we were to accede to the government's view [that the general need for a 'road map' was sufficient], it is difficult to imagine corporate materials that might not contribute to a more comprehensive understanding of the workings of the corporation, and thus, according to the government, be deemed relevant to the tax investigation."). In contrast, the Fifth Circuit in *United States v. El Paso Co.*, *supra*, refused to limit the IRS's summons power in respect of tax accrual workpapers.

protected by a separate work-product privilege for documents prepared in connection with the preparation of audited financial statements.

In reaching its decision in *Arthur Young*, the Court said that "absent unambiguous directions from Congress," 465 U.S. at 816 (*quoting United States v. Bisceglia*, 420 U.S. 141, 150 (1975)), it felt constrained not to shield tax accrual workpapers from disclosure. *Amicus* TEI respectfully suggests that "the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," Fed. R. Evid. 501, support the Court's reexamination of the issue.

Corporate scandals in the first few years of the century involving Enron, WorldCom, and many other companies spotlighted the fragility of financial controls and the ease with which companies could conceal from financial statement auditors activities that threatened the viability of their enterprises and, indeed, the underlying integrity of the U.S. securities market. In the wake of these scandals, in order to restore investor and public confidence in the securities markets, Congress enacted the *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.), which heightened public company financial controls, toughened penalties, and imposed new disclosure obligations. Congress did not, however, mandate either the creation or disclosure of tax accrual workpapers, even though a robust disclosure regime already exists in the Internal Revenue Code. *See e.g.*, 26 U.S.C. § 6662(b)(2)(B) (penalty for understatement

of tax reduced for items disclosed to the Internal Revenue Service).[7]

In addition, new and more demanding accounting rules on the calculation and reporting of tax assets and liabilities—including the calculation of contingent tax liabilities for purposes of establishing financial statement reserves—have come into force. Specifically, in 2006, the Financial Accounting Standards Board introduced a new standard for calculating "uncertain tax positions" that was designed to increase "relevance and comparability in financial reporting of income taxes by clarifying the way companies account for uncertainty in income tax assets and liabilities."[8] Under the new standard, public companies such as Textron here, must evaluate each tax position taken on their returns to determine whether those positions are supported by technical authority that, in the opinion of the company, would "more likely than not" be sustained by a taxing authority. This process often results in detailed written analyses of numerous tax issues including the likelihood of succeeding in litigation and the related mental impressions of tax professionals including both accountants and attorneys.

Finally, in 2002, the IRS issued Announcement 2002-63, 2002-2 C.B. 72, which mandated broader

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[7] The legislative history of 26 U.S.C. § 6662 expressly notes that in no event shall this provision "require the disclosure of accountant's work papers." S. Rep. No. 97-494, 94th Cong., 2d Sess. 274 (1982) (Report of Senate Committee on Finance).

[8] The accounting standards body issued FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, on December 16, 2006. The interpretation is now codified in the FASB's ASC 740.

disclosure of tax accrual workpapers than required at the time of the Court's decision in *Arthur Young*.[9]

These developments since 1984 collectively place a premium on the assessment of tax risk and the calculation of financial reserves in respect of a company's tax position. They also place a premium on confidential communications between companies and their legal advisers in aid of that assessment. On the one hand, financial statement auditors are obligated to pinpoint potentially vulnerable areas of a company's tax returns, make inquiries into the company's legal analysis of those positions and its consideration of whether and how to litigate those issues if their reported treatment were challenged by the relevant tax authority, and document the review. On the other hand, if the IRS can freely seek access to a company's files in pursuit of a "blueprint" (as the court below put it) or in the course of a "fishing expedition" (such as explained in *Hickman*), the company might prepare less documentation for its positions or be less forthcoming in providing it to the

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[9] IRS Announcement 2002-63 significantly broadened the situations in which the IRS would seek access to tax accrual workpapers. In *Arthur Young*, the Court cited with approval the IRS's "administrative sensitivity" to "the intrusiveness of demands for the production of "tax accrual workpapers" in "tightening [of] its internal requirements for the issuance of summonses" for tax accrual workpapers. 465 U.S. at 820-21 & n.17. *See* Internal Revenue Manual § 4024.4 (1981) (access may be had to accountants' tax accrual workpapers only in "unusual circumstances"). The Court stated that the IRS's promulgation of its so-called policy of restraint refuted the taxpayer's argument that granting the IRS access to a roadmap of mental impressions was unfair. 465 U.S. at 821.

auditor, making it more difficult for the auditor to do its job.[10]

A careful balancing of different and sometimes competing interests is necessary in resolving the tax accrual workpaper disclosure issue—specifically, the government's interest "in the enforcement of its laws and collection of the revenue," *Couch v. United States*, 409 U.S. 322, 336 (1973), and the "national public interest, . . . [in] insur[ing] the maintenance of fair and honest markets in [securities] transactions," 15 U.S.C. § 78b (1976). Balancing those issues in 1984, this Court in *Arthur Young* found it unnecessary to fashion a work-product privilege to protect tax accrual workpapers. That determination is ripe for reconsideration in light of the intervening changes to the statutory and regulatory landscape applicable to the preparation and auditing of corporate financial statements.[11] At a minimum, the changing times

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[10] *See* Diss & Hanson, *Tax Contingency Audit Workpapers: 1981-1982 Developments, Observations and Proposals*, 14 Tax Adviser 154, 162 (March 1983) (if summonses for tax accrual workpapers are routinely enforced, "[c]orporations and auditors may be tempted to resort to the 'unwritten' expedient, the very result the Supreme Court wishes to prevent when it first announced the work-product privilege in *Hickman v. Taylor*."); Note, *Protecting the Auditor's Work Product from the IRS*, 1982 Duke L.J. 604, 616 (if auditor workpapers are not protected from disclosure, auditors could "change documentation procedures to ensure that the IRS could gain little from reviewing CPA audit workpapers").

[11] It was concern about policies underlying the securities law that led to the Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In that case, the government argued that no privilege was necessary because there were independent reasons for the corporation to seek legal advice. The Court found, however, that, even assuming an investigation to ensure compliance were undertaken, "the depth and quality of any

reinforce the need to vivify the holding of *Hickman* by reversing the court below.

Amicus Tax Executives Institute respectfully submits that the different times require a different balance than that struck by the court below: The strong public interest in maintaining a high level of financial reporting—a public interest fortified by the corporate scandals in the past decade—outweighs the IRS's purported "need" for a roadmap of the arguments that a taxpayer may raise in defending certain positions in the event of an examination.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted

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investigations to ensure compliance with the law would suffer" unless the privilege were extended to those individuals in the corporation who had knowledge of the relevant information. 449 U.S. at 392-93 & n.2.

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IN THE

Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the work-product privilege, recognized by this Court in *Hickman v. Taylor* and codified in Federal Rule of Civil Procedure 26(b)(3), is limited solely to documents that are prepared *for use* in litigation.

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BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and related topics. In particular, WLF has regularly appeared before this and numerous other federal and state courts to advocate in favor of corporate rights of privacy and confidentiality. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *Estate of Frankl v. Goodyear Tire & Rubber* Co., 853 A.2d 880 (N.J. 2004).

WLF agrees with Petitioner that the appeals court's refusal below to extend work-product protection to Textron's tax accrual work papers is an error that threatens to eviscerate the venerable work-product privilege, a staple of American legal culture and practice for over 60 years. WLF is further concerned that the decision below severely undercuts the important policy goals undergirding the work-product doctrine first announced by this Court in *Hickman v. Taylor*, especially

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file.

the need to protect attorneys' work (and their thought processes) from being invaded by adverse parties. If allowed to stand, the First Circuit's *en banc* opinion will have a significant chilling effect on a corporate counsel's ability to prepare candid legal assessments of its client's position in anticipation of litigation–not only in the specific, tax-related context of this case, but well beyond.

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to further the public interest in preserving the important privacy protections afforded to corporations and other parties by the work-product privilege. All parties have consented to the filing of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

This case raises important issues about the continued viability of the work-product doctrine in the First Circuit, following that circuit's *en banc* reversal of the district court's finding that Petitioner's tax accrual work papers were created in anticipation of litigation and therefore protected against disclosure as confidential work product.

Petitioner Textron Inc. (Textron), based in Providence, Rhode Island, is a publicly traded corporation with several subsidiaries, including Cessna Aircraft and Bell Helicopter. With a global presence in some 39 countries, Textron employs approximately 37,000 people worldwide. As one of the nation's largest corporations, Textron's tax returns are routinely audited. In fact, it is undisputed that the IRS audits every Textron tax return in multi-year cycles. Pet. App.

at 50a. During the relevant period, the IRS permanently maintained audit staff onsite at Textron and assigned approximately 20 employees to audit Textron's tax returns. Pet. Br. at 4. In seven of its past eight audit cycles since 1980, Textron has appealed disputed tax matters to the IRS Appeals Board. Pet. App. at 91a. Three of these disputes ultimately resulted in litigation. *Id.*

In 2003, the IRS conducted an audit of Textron's corporate tax liability for the years 1998-2001. *Id.* at 4a. In connection with that audit, the IRS issued a request, followed by an administrative summons, for Textron's 2001 tax accrual work papers. *Id.* at 91a-92a. Although Textron had produced several thousand pages of documents in response to the IRS audit, it withheld as privileged work product its tax accrual papers, which were prepared by its in-house lawyers. *Id.* at 92a. Specifically, these work papers comprised: (1) a spreadsheet containing (i) a list of issues where the tax laws were vague and possibly subject to challenge by the IRS, (ii) percentage estimates of Textron's likelihood of prevailing on these issues in litigation, and (iii) the dollar amount of tax reserves needed for Textron's potential tax liabilities if its legal positions were unsuccessful; and (2) backup work papers containing draft spreadsheets, notes, and internal memoranda from in-house attorneys providing their legal opinions on uncertain items and percentage estimates. *Id.* at 92a-93a.

When Textron refused to relinquish its work papers, the government filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. *Id.* at 89a. By its own admission, the government sought Textron's work papers to obtain a "roadmap" for evaluating Textron's

tax return, since such documents would "identify weak spots" and allow the government to know "exactly how much Textron should be willing to spend to settle each item." *Id.* at 31a. As it had all along, Textron contended that the documents were protected against disclosure by the work-product privilege, which was first articulated by this Court in *Hickman v. Taylor* and later partially codified as Federal Rule of Civil Procedure 26(b)(3). At an evidentiary hearing, the head of Textron's tax department testified that an important purpose of the documents was to assist Textron in making litigation or settlement decisions concerning the tax treatment of specified items. Pet. Br. at 6. No evidence was submitted to rebut this testimony.

In light of Textron's long history of audits, appeals, and repeated litigation with the IRS, the district court found Textron's anticipation of litigation to be well-founded, concluding that Textron's tax accrual work papers were protected work product under *Hickman v. Taylor* and Rule 26(b)(3). Pet. App. at 105a-118a. In denying the government's petition, the district court determined that the requested work papers "would not have been prepared at all 'but for' the fact that Textron anticipated the possibility of litigation with the IRS." *Id.* at 108a. The district court further held that the government had failed to carry its burden of demonstrating a "substantial need" for ordinary work product, let alone the heightened burden applicable to Textron's tax accrual work papers, which the court identified as opinion work product. *Id.* at 117a-118a. "While the opinions and conclusions of Textron's counsel and tax advisers might provide the IRS with insight into Textron's negotiating position and/or litigation strategy," the district court concluded, "they have little bearing on the determination of Textron's tax liability." *Id. at* 118a.

The government appealed, and a divided panel of the court of appeals initially affirmed the district court's decision, agreeing that the documents in question were protected by the work-product privilege. *Id.* at 47a-88a. Sitting *en banc*, however, the court of appeals granted the government's petition for rehearing, vacated the panel decision, and requested additional briefing from the parties. By a 3-2 majority, the *en banc* court reversed, concluding that the documents sought were not entitled to work-product protection because they had not been "prepared for use in possible litigation." *Id.* at 1a-46a.

Finding "no evidence in this case that the work papers were prepared for . . . use [in litigation] or would in fact serve any useful purpose for Textron in conducting litigation if it arose," *id.* at 18a-19a, the majority emphasized that "[f]rom the outset, the focus of work product protection has been on material prepared *for use* in litigation." *Id.* at 9a (emphasis added). Contrary to the express factual finding of the district court, the appeals court announced that Textron's work papers had been created primarily for a business purpose, not for future litigation. Insisting that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . law suit," the court concluded that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." *Id.* at 15a-17a.

In a lengthy dissent, Judge Torruella, joined by Judge Lipez, criticized the majority for "contraven[ing] m[any] of the principles underlying the work product doctrine." *Id.* at 22a. Recognizing that this case "squarely implicated" the policy rationales for the work-

product doctrine announced in *Hickman*, Judge Torruella reminded the majority that the documents in question "contain counsel's ultimate impression of the value of the case," which are "exactly the sort of mental impressions about the case that *Hickman* sought to protect." *Id.* at 31a. In light of these strong policy rationales, he saw no legal basis for imposing a rule under which an attorney's assessment of the likely outcome of litigation must become available to his adversary merely because the documents also were created for a parallel business purpose. Quoting with approval the Second Circuit's opinion in *United States v. Adlman*, which recognized work-product protection under nearly identical facts, Judge Torruella echoed that "the policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision." *Id.* at 30a. Chastising the majority for ignoring the important policy implications announced in *Hickman*, Judge Torruella concluded that "it is clear that the rationales underlying the work-product doctrine apply to documents prepared in anticipation of litigation, even if they are not also for use at trial." *Id.* at 31a.

Subsequently, the court of appeals granted a stay pending Textron's petition for certiorari to this Court. *Id.* at 119a-120a. In granting the stay request, the court of appeals acknowledged that "the work product privilege finds its origin in a Supreme Court decision that has not often been revisited by the Court." *Id.* at 120a.

REASONS FOR GRANTING THE PETITION

The Petition raises issues of great importance affecting the right of companies to protect a wide range of documents prepared and reviewed by their attorneys, in part to further the company's business interests, but also in anticipation of possible future litigation. For more than 60 years, *Hickman* has served as the touchstone for the proper scope of the work-product privilege in federal court. That landmark decision recognized that modern discovery was never intended to require or even allow for the disclosure of an attorney's legal analysis of his client's position. Textron's tax accrual work papers, which contain the mental impressions, conclusions, opinions and legal theories of its in-house attorneys, lie at the very heart of the work-product privilege.

The First Circuit's decision sets a dangerous precedent. If allowed to stand, the *en banc* opinion below will have a significant chilling effect on a corporate counsel's ability to prepare candid legal assessments of its client's position in anticipation of litigation–not only in the specific, tax-related context of this case, but well beyond. Consistent with *Hickman*, a company should be able to have its attorneys candidly assess its legal position on a business issue without fear that such legal evaluations may later be used against the company by a future legal adversary.

Further, if the appeals court's decision stands, the important policy concerns that animated the *Hickman* decision will be undermined. If the opinion work product of attorneys is no longer afforded a predictable zone of protection, it will discourage thorough preparation by attorneys and reward free riding by those who seek to

exploit their adversary's mental processes. As this Court noted in *Hickman*, if an attorney's mental processes are no longer his own, the impact on the legal profession would be demoralizing, and the interests of both the client and the cause of justice would be poorly served. Such negative consequences on American legal culture and practice warrant further review of the decision below by this Court.

Finally, the widening split of circuit authority exhaustively detailed in the Petition involves the application and interpretation of Federal Rule of Civil Procedure 26(b)(3). Under binding precedents, that rule now has inconsistent applications in the First Circuit, Fifth Circuit, and eight other federal circuits. But the entire policy behind enactment of the Federal Rules of Civil Procedure was to create a uniform standard of legal process in the federal courts. Only this Court can salvage that important policy by creating a single, uniform standard for the application of Rule 26(b)(3).

The goals of fairness, *stare decisis*, and federal uniformity were all injured in this case. WLF joins with Petitioner in urging this Court to grant the petition for a writ of certiorari.

I. THE APPEALS COURT'S DECISION IS CONTRARY TO THIS COURT'S UNANIMOUS HOLDING IN *HICKMAN*

In *Hickman v. Taylor*, this Court embraced the view that "discovery, like all matters of procedure, has ultimate and necessary boundaries." 329 U.S. 495, 507 (1947). In that landmark case, the plaintiff sued for the wrongful death of a seaman during the sinking of the defendant's tug boat. During his investigation, the

defendant's attorney interviewed and obtained statements from the survivors. The plaintiff demanded copies of these statements in discovery, but the attorney refused on grounds that the request sought "privileged matter" and constituted an improper attempt "to obtain indirectly counsel's private files." *Id.* at 499. The district court disagreed and ultimately held the attorney in contempt for refusing to release the statements. This Court unanimously reversed, holding that the materials sought were protected against discovery as the attorney's work product:

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollection prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

Id. at 510. As a result, *Hickman* recognized an established zone of privilege for materials created by counsel "in the course of his legal duties" so that he could work "without undue and needless interference." *Id.* at 511.

Only once modern discovery principles were authorized by the Federal Rules of Civil Procedure had it become necessary for this Court to protect, for the first time, an attorney's work product. "When Rule 26 and other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of

lawyers were thereby opened to the free scrutiny of adversaries." *Id.* at 514. In other words, *Hickman* did not itself create the work product privilege; rather, it acknowledged and enforced what had always been the rule, that "[a]n attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. *Hickman* thus emphasized "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Id.* at 511.

Thus, by the time *Hickman* was decided, "the general policy against invading the privacy of an attorney's course of preparation" was already "so well recognized and so essential to an orderly working of our system of legal procedure" as to be "necessarily implicit." *Id.* at 512. Indeed, as the Court explained, the policy concerns animating the work-product privilege had deep historical roots in the Anglo-American legal tradition.[2] English courts had already developed a concept of privilege to include "all documents which are called into existence for the purpose–but not necessarily the sole

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[2] For a compilation of the early English cases on work-product protection that informed this Court's holding in *Hickman*, *see* J. H. Wigmore, 8 *Wigmore on Evidence* § 2319, at 618-22 (3d ed., 1940); *see also* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. Legal Stud. 359, 383 (1990) (explaining that *Hickman* "found an analogy in the English practice of protecting from discovery all documents prepared by or for counsel with a view to litigation").

purpose–of assisting the deponent or his legal advisers in any actual or anticipated litigation." *Id.* at 510 n.9 (quoting W. Blake Odgers, *Odgers on Pleading & Practice*, at 264 (12th ed., 1939)). This privilege extended to "all papers prepared by any agent of the party bona fide for the use of his solicitor for the purposes of the action, *whether in fact so used or not*." *Id.* (emphasis added).

More than six decades later, *Hickman* remains the touchstone for the proper scope of the work-product privilege in federal court. And while Federal Rule of Civil Procedure 26(b)(3) was amended in 1970 to also provide protection for attorney work product, that rule is properly understood as only a partial codification of the protections guaranteed by *Hickman*. *See, e.g.*, Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine,* 29 Rev. Litig. 121, 134 (2009) ("Rule 26(b)(3) is considered by commentators to be only a 'partial codification' of the protections recognized in *Hickman* because there are several differences between the protection initially recognized by the Supreme Court and that offered by the Rule."); J.W. Moore, 6 *Moore's Federal Practice* § 26.70[2][c] (3d ed., 1997) ("*Hickman* is only partially codified in Rule 26(b)(3) and continues to have vitality outside the parameters of the Rule."). Indeed, "[o]ne of the most significant features of the current work product doctrine is the coexistence of *Hickman* and rule 26(b)(3)." Jeff A. Anderson et al., *Special Project: The Work Product Doctrine*, 68 Cornell L. Rev. 760, 762-63 (1983).

Thus, the adoption of Rule 26(b)(3) has not displaced *Hickman* as the primary source of authority for work-product protection; to the contrary, *Hickman* and

its progeny remain as relevant as ever. *See, e.g.*, In re *Grand Jury Subpoena*, 510 F.3d 180, 185 (2d Cir. 2007) (looking to the "common law principles" announced in *Hickman*), *cert. denied*, 128 S. Ct. 2918 (2008); In re *Seagate Tech., LLC*, 497 F.3d 1360, 1376 (Fed. Cir. 2007) (acknowledging that although "the work product doctrine was partially codified in Rule 26(b)(3)," the "[c]ourts continue to apply *Hickman*"). Accordingly, the rule should be interpreted and applied with fidelity to the concerns articulated in *Hickman*.

Rightly understood, *Hickman* was broadly interested in protecting materials prepared in anticipation of an adversarial setting. *See* Pease-Wingenter, *supra*, at 138 ("The key requirement seems to be that the materials are prepared in anticipation of an adversarial setting."); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 504-06 (4th ed., 2001) ("The proceeding for which documents are prepared need not actually take place in a court of record, as long as the proceeding is adversarial in nature."). More importantly, *Hickman* never suggested that the work-product privilege was limited to materials prepared *for use* in litigation, much less to those prepared *for use* at trial. Recognizing that not all attorneys are litigators, this Court announced a much broader protection for an attorney's materials prepared "in the course of his legal duties." 329 U.S. at 510. And when *Hickman* did speak of "litigation," it expressed its concern for protecting materials prepared merely "with an eye towards litigation," not *for use* in litigation as curiously required by the First Circuit below. *Id.* at 511.

The core holding of *Hickman* is unequivocal and has never changed: modern discovery was never intended to require or even allow for the disclosure of an

attorney's legal analysis of his client's position, which is always unnecessary to develop the factual record underlying any dispute. Unlike ordinary work product, such opinion work product is sacrosanct. 329 U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."). And this Court has since reaffirmed, in the very context of an IRS summons, that "such work product (attorney's opinions and mental impressions) cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). Rule 26(b)(3) further embodies this principle by requiring that a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." Fed. R. Civ. P. 26(b)(3).

The appeals court's decision below abandons the robust work-product protection long guaranteed by this Court in *Hickman*. First, it is undisputed that the documents sought in this case contain "nothing more than counsel's opinions regarding items that might be challenged because they involve areas in which the law is uncertain and counsel's assessment regarding Textron's chances of prevailing in any ensuring litigation." Pet. App. at 101a-102a. Such opinion work product, which consists of the mental impressions, conclusions, opinions or legal theories of in-house attorneys, lies at the very heart of the work-product privilege. *See Hickman*, 329 U.S. at 510 (establishing protection for the "written statements, private memoranda and personal recollection prepared or formed by an adverse party's counsel in the course of his legal duties."). Tellingly, the IRS has previously sought and obtained work-product protection for nearly

identical materials. *See Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (upholding IRS's assertion of work product privilege over internal "memos advising the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses to the agency, and the likely outcome"). At its core, "the work-product doctrine shelters the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Here, as in *Hickman*, Textron's attorneys should be entitled to prepare legal theories and plan potential litigation strategy free from unnecessary intrusion by its adversaries.

Second, nothing in the appeals court's ruling refutes the fact, clearly established in the record below, that Textron prepared the relevant materials "with an eye towards" a potential tax dispute with the IRS. Prudent companies such as Textron routinely anticipate such controversies and begin legal preparation well in advance of the time an appeal or litigation is formally commenced. In this case, it is undisputed that the IRS has audited every Textron tax return since 1980. Pet. App. at 50a. In seven of its past eight audit cycles, Textron has appealed disputed tax matters to the IRS Appeals Board. *Id.* at 91a. Three of these disputes ultimately resulted in litigation. *Id.*

Contrary to the First Circuit's view, "any experienced litigator" would know that the exam and appeals stages of a tax dispute are very adversarial and, even if settled, can result in significant additional tax liability for the company. The record here is clear that the matters identified in Textron's work papers concerned issues on which the law was unclear. *Id.* at

109a. And as the district court aptly observed, "[i]f Textron had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." *Id.* at 108a.

Third, the mere fact that such documents may also serve a separate business-related purpose is irrelevant to the question whether they are entitled to protection under *Hickman*. *See, e.g.*, *United States v. Adlman*, 134 F.3d 1194, 1197-98 (2d Cir. 1998) ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision."). The appeals court fails even to consider the modern reality that materials prepared in furtherance of a business purpose are frequently prepared in anticipation of litigation. As a result, the First Circuit's novel "for use in litigation" standard is contrary to more than 60 years of precedent and cannot be reconciled with this Court's longstanding work-product doctrine.

In sum, there is simply no way to square the First Circuit's opinion in this case with this Court's clear mandate in *Hickman*. Review is warranted because only this Court can now remedy the harm done to the work-product privilege by the decision below.

II. THE APPEALS COURT'S DECISION UNDERMINES THE IMPORTANT POLICY CONSIDERATIONS THIS COURT SET FORTH IN *HICKMAN*

The court of appeals' decision not only ignores the applicability for work-product protection established by

this Court in *Hickman* but, if allowed to stand, will do violence to the important policy considerations undergirding that decision and the doctrine it embraced. Namely, if the opinion work product of attorneys is no longer afforded a predictable zone of protection, it will discourage thorough preparation by attorneys and reward free riding by those who seek to exploit their adversary's mental processes.

A. The Appeals Court's Decision Will Discourage Thorough Preparation By Attorneys.

Hickman repeatedly expressed concern that the discoverability of work product would have a negative impact on attorneys' behavior. "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510-11. One important policy consideration behind this Court's recognition of the work-product doctrine, then, is to encourage attorneys to prepare thoroughly and to investigate both favorable and unfavorable aspects of their case.

If an attorney's private preparations are freely discoverable, Justice Murphy worried, "much of what is now put down in writing would remain unwritten." *Id.* at 511. "The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* Without a reliable zone of privacy, attorneys cannot be effective advocates for their clients. They may be tempted to abandon avenues of investigation likely to produce bad facts for their client. Or they may be tempted to destroy

documents that would later be of value in preparing for trial. This undermines the quality of representation as a whole.

The appeals court's decision below threatens to have a chilling effect on how attorneys behave. By effectively eviscerating a reliable and predictable work-product privilege, the court has given little incentive for attorneys to maintain candid written assessments of their client's position. Obviously, an in-house attorney may feel compelled not to write or record certain information if he feels his opponent can discover it. This may force him to rely solely on his memory or some other unreliable method. As the dissent observes, "if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid putting it in writing, thus diminishing the quality of representation." Pet. App. at 32a (Torruella, J. dissenting). The majority opinion does not even acknowledge, much less take into account, these very real concerns.

A lawyer investigating a legal matter does not always know in advance what his investigation will uncover. In simply thinking about a case, a lawyer often will produce insights that are more helpful to his adversary than to his own client. In today's litigious environment, virtually every significant business decision a company makes has legal ramifications that will require a sound analysis. But if the First Circuit's holding is allowed to stand, as *Hickman* predicted, "[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases at trial." 329 U.S. at 511.

B. The Appeals Court's Decision Threatens To Undermine The Adversary System Of Justice By Rewarding Free Riding.

An adversary system of justice ensures that each side in a dispute works fully to advance its client's interests in pursuit of the truth. But, as *Hickman* fully appreciated, an adversary system simply cannot function without a healthy culture of candor and confidentiality. Allowing a party to gain inside knowledge of its opponent's legal strategy obviously weakens the adversary system and undermines incentives. Further, knowledge of an opponent's evaluation of the probability of success, and the amounts it is prepared to pay, seriously erodes the prospects for fair settlement before trial. Ultimately, diligent and prudent companies will be unfairly disadvantaged if forced to turn over their internal legal analyses to future litigation opponents. This concern for preserving the integrity of the adversary system was central to this Court's holding in *Hickman*.

The plaintiff's counsel in *Hickman* conceded that he sought opposing counsel's files "to help prepare himself to examine witnesses and to make sure that he has overlooked nothing." *Id.* at 513. This Court sharply dismissed those reasons as insufficient to invade another attorney's files. This aspect of the case disturbed Justice Jackson so much that he wrote a separate concurrence in part to address it. "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J. concurring). Further, he could "conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver

to his adversary" his account of the case. *Id.* Astonishingly, the First Circuit's decision in this case threatens to do just that.

Here, like the plaintiff in *Hickman*, the government has freely admitted that it seeks Textron's work papers to obtain a "roadmap" for evaluating Textron's tax return, since such documents would "identify weak spots" and allow the government to know "exactly how much Textron should be willing to spend to settle each item." Pet. App. at 31a. The appeals court did not question the IRS's explicit motivation for seeking the work papers, even though this is precisely the motivation that this Court so roundly rejected in *Hickman*. The implications for future targets of the IRS are clear. As this Court has previously recognized, "tax accrual workpapers pinpoint the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes." *United States v. Arthur Young & Co.*, 465 U.S. 805, 813 (1984). The appeals court's decision, if allowed to stand, would provide the IRS with an unfair advantage in future litigation by granting it access to Textron's detailed legal analysis of the strengths and weaknesses of its various tax positions. *See* Pet. App. at 31a ("Revealing such impressions would have clear free-riding consequences. With this information, the IRS will be able to immediately identify weak spots and know exactly how much Textron should be willing to spend to settle each item.") (Torruella, J. dissenting).

In sum, the work-product privilege was adopted to prevent a future litigant from doing precisely what the government nakedly admits to doing here–taking a free ride on the research and thinking of an opponent's

attorneys. *See United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006) (noting that "the IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged."). Without the vital protections of the work-product privilege, an attorney cannot be an effective advocate for his client. In the absence of a lawyer's role as an effective advocate, both the client and the adversary system suffer. The implications of the appeals court's decision below cannot be understated.

III. REVIEW IS WARRANTED TO PRESERVE THE IMPORTANT GOAL OF UNIFORMITY BEHIND THE FEDERAL RULES

Review here is warranted for the independent reason that the widening split of circuit authority on this issue concerns the application and interpretation of Federal Rule of Civil Procedure 26(b)(3). As the Petition ably demonstrates, the federal courts of appeal are hopelessly split on the issue of whether, and to what extent, materials prepared "in anticipation of litigation" are entitled to work-product protection against discovery. The First Circuit, Fifth Circuit, and eight other federal circuits have announced three different and inconsistent interpretations for Rule 26(b)(3). *See* Pet. Br. at 12-20. But Rule 26(b)(3) should mean the same thing and afford parties with the same work-product protection in Massachusetts and Rhode Island as it does in New York and Texas. The decision below only exacerbates this problem.

Importantly, it was this disparity of legal process among the states that served as the primary catalyst for

the federal rules in the first place. Indeed, the creation of federal procedural rules was bottomed entirely on the need for uniformity of procedure in the federal courts. *See Sayre v. The Musicland Group, Inc.*, 850 F.2d 350, 354 (8th Cir. 1988) (stating that the "purpose of the Federal Rules of Civil Procedure" was "to provide uniform guidelines for all federal procedural matters"); Erwin Chemerinsky & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995) (noting that the "primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country").

In sum, the entire purpose of the Federal Rules of Civil Procedure was to provide a uniform and orderly process of adjudicating cases in the federal system. An ongoing circuit split, especially one that has been further complicated by the decision below, only defeats the purpose of having a system of standardized procedural rules in the federal system. It is difficult to overestimate the detrimental effect that the decision below will have on the value of uniformity that the Federal Rules of Civil Procedure were intended to foster. Only this Court can create a single uniform standard for the application of Rule 26(b)(3).

CONCLUSION

Amicus curiae requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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